Denver Law Review

Volume 66 | Issue 2 Article 8

February 2021

Vol. 66, no. 2: Full Issue

Denver University Law Review

DENVER UNIVERSITY LAW REVIEW

VOLUME 66

1988-1989

Published by the
University of Denver
College of Law

1989 Volume 66 Issue 2

DENVER UNIVERSITY LAW REVIEW

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The Denver University Law Review (ISSN 0883-9409) is published quarterly by the University of Denver College of Law through the Denver University Law Review Association. Publication is in the fall, winter, spring, and summer. Editorial and General Offices are located at 7039 East 18th Avenue, Denver, Colorado 80220; Tel. (303) 871-6172. Subscription price: Domestic, $20.00 per volume; Foreign, $21.00 per volume. Subscriptions are renewed automatically unless notice of discontinuance is received. No discounts are given to subscription services. Separate mailing and billing addresses should add $1.00 per volume. Single issues of the current volume are available from the Association at $8.00 per issue (enclose check with order). All issues of prior volumes may be obtained from William S. Hein Co., Inc., 1285 Main St., Buffalo, New York 14209. Address all other correspondence to the Offices of the Association. Manuscripts should be submitted in duplicate, typed triple spaced, with footnotes at the end, and should comply with *A Uniform System of Citation*, published by the Harvard Law Review Association. Second class postage paid at Denver, Colorado and at an additional mailing office. POSTMASTER: Please send all address changes to Business Editor, Denver University Law Review, 7039 East 18th Avenue, Denver, Colorado 80220.

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TESTIMONIAL CONSISTENCY: THE HOBGOBLIN OF THE FEDERAL FALSE DECLARATION STATUTE

SIDNEY DELONG*

INTRODUCTION

When a witness testifies inconsistently with his former testimony, any one of several things might be happening. The witness might be expressing a change in his memory or understanding of the events about which he is testifying, the witness might be correcting an intentional falsehood in the former testimony, or the witness might be lying. Because inconsistent testimony *per se* is neither harmful nor beneficial to the judicial process, the law has no apparent reason to deter a witness from testifying inconsistently with his former testimony. Yet, inconsistent testimony is penalized under federal perjury law. This article questions the wisdom of such a rule.

A perjury statute cannot be judged in isolation from the judicial system in which it functions. In the American adversary trial process, evidence is taken through factual narratives that unfold during trial examination. Attorneys from one side, then from the other, ask witnesses questions designed to elicit favorable testimony. A witness's story is not told all at once but in bits and pieces over time. Under cross-examination the witness is asked to test his first account against his memory, common knowledge, or the examiner's suggestions. As a result of cross-examination, a witness's recollection or understanding of events may change, even as he testifies. An ability to explain, revise, or even to disavow former testimony is implicit in the adversary examination as presently structured.

As presently formulated and construed, the federal perjury laws unrealistically ignore the needs of the adversary trial process by mandating a sort of "foolish consistency" in trial and grand jury testimony. Witnesses who change their testimony for any reason are jeopardized by a statute that deems inconsistent testimony to be *prima facie* evidence of perjury. Simultaneously, the law appears to invite witnesses to correct testimonial errors, promising immunity from prosecution if they do. In reality, the promise is empty. The provisions are not merely theoretically incoherent, they are counterproductive as well. To inhibit inconsistent testimony is to inhibit truth as well as falsehood. A rule mandating consistency in testimony costs more than it is worth as a deterrent to perjury.

This article focuses on the inconsistent statement provision of the Federal False Declaration Statute. Part I of this article identifies certain

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anomalous aspects of perjury that make it particularly difficult to control by threats of punishment. Perjury's resemblance to innocent mistake creates a risk that criminal sanctions will be misapplied. These sanctions may have counterproductive effects, at times inducing people to commit perjury and at others inhibiting people from correcting inaccurate testimony that they have previously given. Part II demonstrates the way in which the conflict between the goals of deterrence and mitigation is manifested in the federal perjury laws, which seek both to penalize "inconsistent" testimony and to encourage "recantation" of incorrect testimony. Statutory restrictions and judicial construction have resolved this conflict against mitigation. Part III describes the harmful effects of this statutory policy on witnesses and the attorneys who represent them. It also questions the strategic value of the inconsistent statement provision to federal prosecutors. Part IV offers a recommendation for a more coherent statutory policy toward inconsistent testimony and evaluates that recommendation in light of the regulatory problems identified in Part I. It concludes that federal law should more liberally encourage corrections of prior testimony even at the cost of some additional loss in deterrence.

I. A BRIEF EXAMINATION OF SOME PROBLEMS IN REGULATING PERJURY

The crime of perjury tends to resist analysis under the traditional criminal law model of deterrence. Deterrence theory assumes that people will refrain from criminal activity if they know that criminal acts will be met with swift and certain punishment. In its modern, economic incarnation, deterrence theory sees the potential criminal as a rational economic actor capable of calculating the costs and benefits of different courses of conduct.[1] Such a theory posits that if such an actor concludes

1. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 205-06 (3rd ed. 1986); Posner, *An Economic Theory of the Criminal Law*, 85 COLO. L. REV. 1193 (1985). This analysis also assumes that the criminal is risk neutral, accurately informed about the relevant factors, and can do his math correctly.

Perjury laws find their economic justification in the costs that false testimony imposes on the litigation system. Perjured testimony, if it succeeds in its objective, misleads the trier of fact into inaccurate judgments, which in turn result in injustice and in social costs. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW at 514. The possibility of perjury also increases the transaction costs associated with litigation. In the absence of any sanction against perjury, litigants and triers of fact would be driven to seek more complete, and thus more costly, corroboration of witnesses' testimony.

To act as a deterrent, perjury laws must impose risks that offset the benefits that witnesses may anticipate from the commission of perjury. The potential perjurer who thinks like a risk-neutral economist or gambler will forego perjury when his estimate of the cost of the penalty multiplied by what he perceives to be the likelihood of its imposition (the "cost product") exceeds his estimate of the product of the value to him of what perjury would bring about, multiplied by the perceived likelihood that the perjury will bring the benefit about (the "benefit product"). Increasing the cost product by increasing the sanctions or by increasing the likelihood of their imposition should decrease the amount of perjury committed. When the benefit product is large, as it may be for witnesses who are criminal defendants facing capital charges, it is unlikely that increasing the cost product will decrease perjury.

The potential perjurer's actual calculation of potential costs and benefits can be a bit more complex than this description suggests because of a form of reciprocal relationship

that the costs to him of conviction multiplied by the likelihood of conviction exceed the product of the crime's benefits to him multiplied by the likelihood that he will realize such benefits, he will refrain from committing the crime. Lawmakers can alter the costs of conviction by changing the penalties for conviction. They can alter the probability of conviction by changing the elements of the offense. Applied to perjury, then, the assumptions of deterrence theory imply that increasing the cost or probability of conviction of perjury will lead to a reduction in the occurrence of the offense, making trial testimony more truthful and judgments more reliable.

Several phenomena make application of the deterrence model to perjury problematic. Evidence tending to prove the *actus reus* of perjury is often ambiguous, making perjury difficult to distinguish from innocent behavior. Depending on its response to this problem, the law of perjury risks over or under-deterrence. The cost/benefit analysis of the deterrence model is also complicated by the tendency of perjury laws that penalize inconsistent testimony to dissuade witnesses from mitigating the effects of prior perjury or innocently incorrect testimony. The following subsections discuss these phenomena.

A. *The Problem of Detection*

Perjury at common law is the willful making of a false oath about a material fact in a judicial proceeding.[2] Although the crime of perjury occurs under the very nose of the judicial system, its detection and punishment have always presented serious difficulties. The theory of deterrence requires that the trier of fact be able to identify the proscribed

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between the cost product and the value component of the benefit product. The value of the perjury to the witness will depend in part upon the likelihood that the jury will believe him. Anything that makes the perjury more believable will increase its value and increase the incentive to lie, up to a limit represented by the potential gain represented by a favorable judgment or the loss represented by an unfavorable one. The believability of the perjury will depend in part on the jury's estimate of the witness's perception of the risk of punishment if he is caught lying. Thus prosecutors argue in capital cases that a defendant who testifies has nothing to lose by perjury: the cost product will exceed any benefit product. This calculation leads to an anomaly: the greater the likelihood of punishment, the more likely the jury is to believe the witness, and the greater the incentive he has to lie. That is, the increased risk of punishment makes it more likely that the jury will believe the lie, increasing the value of the lie. The risk would, for the same reason, also tend to decrease the likelihood of a perjury conviction, reducing the risk component of the cost product.

But there are wheels within wheels. A rational jury would take this increased incentive into consideration and would both discount the cost product and increase its estimate of the benefit product. The jury's reaction would reduce the witness's incentive to commit perjury. A rational witness, however, would know that the jury would discount the credibility of his testimony in this way. This knowledge, which of course a rational jury will foresee, once again makes his testimony more credible. But if the jury takes this into account, etc. This endlessly oscillating, reciprocal relationship suggests that even if all the actors are rational, the effect of an increased risk of punishment will depend on indeterminate interactions among the actors. *See* Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263, 1280-84 (1985).

2. *See infra* note 16. Additional elements not pertinent to the discussion here are that the matter be material and that the statement be given in a judicial proceeding.

behavior reliably in order to avoid over or under-deterrence.[3] Optimal enforcement of perjury laws requires an accurate way of identifying perjurious statements and distinguishing them from innocent testimonial inaccuracies. Unfortunately, the chief objective manifestation of the crime of perjury, the falsity of a witness's sworn statement, is a common characteristic of innocent behavior or even behavior that the justice system should encourage.[4]

The giving of false evidence can be wholly innocent. False evidence can result from truthful testimony about inaccurate observation, memory lapse, misunderstanding, or miscommunication. A witness who misperceived an event may truthfully testify to his misperception. A forgetful witness may truthfully describe his inaccurate recollection of an event. A witness who misunderstands a question may truthfully answer the question that he thought he heard. In some of these instances, the witness might even be said to have "known" the truth at the time he testified falsely. Yet in none of them has the witness willfully made a false oath. Mere falsity of the witness's statement furnishes an inadequate inference of perjury.

An arguably more obvious manifestation that a witness intentionally lied is that he made inconsistent sworn statements. Here, it would seem, the inference of intentional lying is stronger than that resulting from mere falsity because in making one of the statements, the witness seems to acknowledge that he knows the other to be false. Yet, inconsistent statements alone are insufficient to support an inference of perjury. A witness will testify inconsistently whenever he corrects any of the innocent testimonial errors noted in the preceding paragraph.

The difficulty of identifying perjury creates a risk that perjury laws will result in overdeterrence if they identify and penalize ambiguous behavior or inconsistent statements, as a substitute for the behavior sought to be regulated, intentional lying. As will be seen, federal perjury law has adopted this strategy.

B. *The Problem of Counterproductivity*

> Haldeman: [Speaking hypothetically] But Magruder then says . . ."Now, I go down to the Grand Jury, because obviously they are going to call me back, and I go to defend myself against McCord's statement which I know is true. . . You're saying to me, 'Don't make up a new lie to cover the old lie.' What would you recommend that I do? Stay with the old lie and hope I would come out, or clean myself up and go to jail?"[5]

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3. *See* R. POSNER, *supra* note 1, at 514. Over-deterrence refers to the inhibition of nontargeted behavior by the threat of punishment; under-deterrence refers to the failure of the threat of punishment to deter all of the targeted behavior.

4. In a sense, the very nature of the trial process implies that false testimony must be and remain commonplace. The *raison d'etre* of a trial is to resolve conflicting accounts of events by announcing a form of public truth, a finding of fact. Such a finding necessarily implies that some of the conflicting evidentiary accounts are "false." In this sense, trials are replete with evidence that is later regarded as having been false, but not perjurious.

5. THE WHITE HOUSE TRANSCRIPTS 246 (G. Gold ed. 1974).

Laws that punish lying often have unpredictable effects. Threats to punish lying sometimes induce people to lie precisely in order to avoid the punishment for lying, as in the quoted example.[6] This paradoxical risk is most pronounced whenever the witness is asked to acknowledge that prior testimony was inaccurate, e.g. during cross-examination. If inconsistent testimony increases the likelihood of punishment, the witness who realizes that her original testimony was inaccurate will have an incentive to lie on cross-examination whether or not the original response was perjurious. Unlike most other criminal laws, perjury statutes can create a perverse incentive to commit the very act they forbid. As a corollary, they are also unusually[7] counterproductive in deterring witnesses from engaging in the forms of inconsistent testimony that the judicial system wishes to encourage. Inconsistent testimony is often a sign of *bona fides* rather than duplicity. Testimonial revisions are the natural concomitant of candor and are often essential to the development of evidence at trial.

This potential for counterproductivity precludes a simple reliance on the assumption that maximizing the penal costs imposed on perjury will necessarily inhibit it: such "disincentives" might actually be incentives. Increasing their severity might well increase the incidence of the harm they are intended to prevent.[8] Any perjury prevented by an increase in punishment must be additionally discounted by the value of the useful testimonial corrections that such punishment inhibits.

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6. In economic terms, a lie may reduce the witness's chances of being apprehended and convicted of committing prior perjury. It also may reduce the witness's exposure to conviction for perjury when the witness has innocently testified inaccurately. The witness who contemplates changing previously inaccurate testimony must perform a rather complicated calculation of the probability-weighted costs he will face under each course of action, i.e. affirmance of the previous testimony or retraction of the testimony. Affirmance may decrease the chance of detection yet increase the likelihood of conviction if the lie is detected because it reduces the defendant's ability to argue that the lie was inadvertent. Retraction will have effects that vary with the legal effect of retraction, as discussed below.

7. Normally, criminal sanctions do not threaten to deter desirable behavior. Laws against murder, theft, or drug dealing, for example, rarely jeopardize or inhibit activities generally thought to be socially useful because the activities involved in those crimes rarely resemble socially useful behavior. When the behavior to be regulated itself is sometimes socially useful, regulations can, in theory, be tailored so as to permit the behavior at the optimum level. *See* Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); A.M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 73-84 (1983); Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984) (characterizing sanctions as involving abrupt jumps in the cost of illegal activity and prices as more elastic). Even if we assume that perjury is never socially useful however, it does not follow that laws against perjury do not jeopardize socially useful activity.

8. The problems of detecting perjury make this possibility doubly perplexing because the effects of perjury statutes cannot be measured. Unlike some other crimes, occurrences of perjury cannot be quantified. Without data on the relative effects of the counterproductive potential, we cannot tell whether the benefits of an increased likelihood of conviction will exceed the costs. The lack of any data on the ratio of punishment to occurrence makes it impossible for either the perjurer or the legislator to engage in classic risk/benefit analysis that is central to the instrumentalist calculus. "Proof" of the relative effectiveness of various forms of the perjury statute must therefore proceed by argument based on speculation and anecdote. In this respect, we have not advanced much since Holmes' plaintive question: "What have we better than a blind guess to show that the criminal law in its present form does more good than harm?" O.W. HOLMES, *The Path of the Law*, COLLECTED LEGAL PAPERS 180 (1920).

C. *The Problem of Deterrence versus Mitigation*

Conflict between the goals of deterrence and mitigation is inevitable in any criminal statute. The more effective a criminal statute is in deterring conduct through the threat of swift and certain punishment, the more such a statute inhibits people who have engaged in the conduct from admitting it so as to minimize the damage caused by the conduct. With some crimes, this loss of mitigation is negligible in relation to the value of deterring the conduct. Thus, it is presumably more important to deter murder than it is to encourage confessions of murder because a confession does little to remedy the harm caused by the act.[9] One cost of severe sanctions against murder may well be to increase the costs of investigation of such crimes but this cost is thought to be outweighed by the value of the deterrence purchased by those sanctions.

Perjury does not yield to such simplistic analysis. Although the crime of perjury is complete when the witness makes the the false statement, perjury usually does not cause serious harm until a tribunal acts in reliance on the false statement. Such harm can be largely obviated if the perjury is corrected before the tribunal acts. Thus, in most cases there is a window of time after the perjury is committed and before the tribunal acts during which the harm can be mitigated. The judicial system has a strong institutional interest in encouraging witnesses to correct perjurious statements before tribunals act in reliance on them. In addition, as noted in the preceding subsection, the judicial system also has an even greater interest in encouraging the correction or mitigation of innocently inaccurate testimony.

Yet, to give witnesses an opportunity to correct perjury and thereby avoid punishment weakens the deterrent effect of sanctions against perjury and could increase the incidence of the crime and its associated costs. Witnesses might be more inclined to make the initial decision to commit perjury under a rule that permitted them to correct the perjury without risk of punishment.[10]

Because maximum punishment for intentional lying will always interfere with maximum incentives to correct lies, as well as innocent errors, any perjury rule must mediate the conflict between the institutional goals of deterrence and mitigation. The conflict is clearly apparent in the federal perjury statutes.

II. THE FEDERAL PERJURY STATUTES

Two federal statutes prohibit the giving of intentionally false testimony in federal trial and grand jury proceedings: the General Perjury

9. Where social gain can be seen from the defendant's mitigation of the effects of his criminal behavior, the law does encourage such mitigation, as in the defense of withdrawal in the law of attempt. *See* MODEL PENAL CODE § 5.01(4) and accompanying Comment (defense offers defendants a motive to desist from criminal designs); Rotenberg, *Withdrawal as a Defense to Relational Crimes*, 1962 WISC. L. REV. 596.

10. This possibility is discussed below, Part IV.

Statute[11] and the False Declaration Statute.[12] Considered together, these statutes create a bewildering schedule of risks and rewards for the witness who contemplates changing his testimony.

Because of the difficulty in distinguishing perjured testimony from innocent mistakes, courts have historically applied the severe sanctions of the law of perjury with caution, so as not to punish innocent behavior or unduly frighten prospective witnesses.[13] This reluctance has, until recently, been manifested in evidentiary rules that make perjury exceptionally difficult to prove.[14] The federal perjury laws illustrate both the old reluctance and a newer approach, designed to facilitate conviction.

A. *The General Perjury Statute and the Common Law Evidence Rules*

The General Perjury Statute, which derived from the common law,[15] defines perjury as "willfully and contrary to . . . oath [stating or

11. 18 U.S.C. § 1621 (1982). *See infra* note 16.

12. 18 U.S.C. § 1623 (1982). *See infra* note 26.

13. Bronston v. United States, 409 U.S. 352, 359 (1973) ("The seminal modern treatment of the history of the offense concludes that one consideration of policy overshadowed all others during the years when perjury first emerged as a common law offense: 'That the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying.' *Study of Perjury, reprinted in* REPORT OF NEW YORK LAW REVISION COMMISSION, LEGIS. DOC. No. 60, 249 (1935)); Weiler v. United States, 323 U.S. 606, 608-10 (1945). *See also* United States v. Ryan, 828 F.2d 1010 (3d Cir. 1987) (The rule that perjury convictions not be based on excessively vague or fundamentally ambiguous questions prevents witnesses "from unfairly bearing the risks associated with the inadequacies of their examiners, and . . . encurage[s] participation in the judicial system."); 7 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2041 (Chardbourne Rev. 1978) (hereinafter EVIDENCE) (citing W.M. BEST, EVIDENCE 605-06 (1849)):

> Measured merely by its religious or moral enormity, perjury, always a grievous, would in many cases be the greatest of crimes, and as such be deserving of the severest punishment which the law could inflict. But when we consider the very peculiar nature of this offence, and that every person who appears as a witness in a court of justice is liable to be accused of it by those against whom his evidence tells, who are frequently the basest and most unprincipled of mankind; and when we remember how powerless are the best rules of municipal law without the co-operation of society to enforce them, — we shall see that the obligation of protecting witnesses from oppression, or annoyance by charges or threats of charges of having borne false testimony, is far paramount to that of giving even perjury its deserts. To repress that crime, prevention is better than cure; and the law of England relies, for this purpose, on the means provided for detecting and exposing the crime at the moment of commission, — such as publicity, cross-examination, the aid of a jury, etc.; and on the infliction of a severe, though not excessive punishment, whenever the commission of the crime has been clearly proved.

14. *See* discussion at Part I-A, below. Perhaps as a result of these rules, the number of prosecutions for perjury in the federal courts has been miniscule in relation to the amount of intentional false testimony that common experience tells us must take place. For example, in the ten year period from 1956 to 1965, out of 307,227 federal criminal defendants charged, only 713 were charged with perjury. The conviction rate for perjury was 52.7% in comparison to 78.7% for all other crimes. 115 CONG. REC. 5880 (1969) (remarks of Sen. McClellan). These data antedated the passage of the False Declaration Statute.

15. At common law, perjury consists of willfully making a false oath with regard to a material matter while under oath in a judicial proceeding. *See* WHARTON'S CRIMINAL LAW § 601 (C. Torcia 14th ed. 1978); R. PERKINS & R. BOYCE, CRIMINAL LAW 511 (3d ed. 1982); MODEL PENAL CODE § 241.1 Comment 1 ("In general, [perjury] consists of four elements: (i) the making or reaffirming of a false statement; (ii) that is material to an official proceeding; (iii) in violation of an oath or equivalent affirmation; (iv) when the party making the statement does not believe it to be true."). An answer that is literally true is not perjury, even if it is not responsive and arguably misleading by negative implication.

subscribing] any material matter that [the witness] does not believe to be true."[16]

Prosecutions under the General Perjury Statute must satisfy strict common law proof requirements. The government must prove that the witness willfully made a statement without a belief that the statement was true.[17] This lack of belief must usually be inferred from the untruth of the statement.[18] Federal courts have added as an element that the government prove that statement was actually untrue.[19]

To prove that the statement was untrue, the government must satisfy the two-witness rule, which provides that the falsity of the oath cannot be proved by the uncorroborated testimony of only one witness.[20]

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16. 18 U.S.C. § 1621. The text of the statute is as follows:

> Whoever—
> (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or
> (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;
> is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

17. Untrue testimony is not perjurious unless the witness does not believe it to be true. 18 U.S.C. § 1621 (1982). Thus, untrue testimony is not perjury if it results from a slip of the tongue, a misunderstanding of the question, misperception, or a faulty memory. *See* MODEL PENAL CODE § 241.1 Comment 3. Some courts held that a sworn untruth made recklessly, or without knowledge of whether it was true, was not perjury, although most held that it was. *Compare id.* (recklessness is sufficient for guilt) *with* WHARTON'S CRIMINAL LAW §§ 602-03. *See also* United States v. Remington, 191 F.2d 246, 248 (2d Cir. 1951), *cert. denied,* 343 U.S. 907 (1952); WHARTON'S CRIMINAL LAW § 604; and R. PERKINS & R. BOYCE, CRIMINAL LAW 516-17. The general federal rule is that true testimony given under a mistaken belief that it is false is not perjury. MODEL PENAL CODE § 241.1 Comment 2(d).

18. American Communication Ass'n v. Douds, 339 U.S. 382, 411 (1950); United States v. Sweig, 441 F.2d 114, 117 (2d Cir.), *cert. denied,* 403 U.S. 932 (1971) ("In the absence of an admission by the defendant, the only way a defendant's knowledge of the falsity of his statement can be proved is through circumstantial evidence."); MODEL PENAL CODE § 241.1 Comment 2(d) ("In the usual perjury prosecution, corroboration of an intent to lie is provided by the falsity of the statement made.").

19. United States v. Forrest, 623 F.2d 1107, 1110 (5th Cir.), *cert. denied,* 449 U.S. 924 (1980); United States v. Magin, 280 F.2d 74, 76 (7th Cir.), *cert. denied,* 364 U.S. 914 (1960). The rational of such a requirement is that, in the absence of the corroboration of the defendant's intent established by the falsity of the statement, a significant danger exists that a conviction would be based upon jury speculation.

20. Hammer v. United States, 271 U.S. 620, 626 (1926). In Weiler v. United States, 323 U.S. 606 (1945), the Court justified retention of the two witness rule as follows:

> The special rule which bars conviction for perjury solely upon the evidence of single witness is deeply rooted in past centuries. That it renders successful perjury prosecution more difficult than it otherwise would be is obvious, and most criticism of the rule has stemmed from this result. It is argued that since effective administration of justice is largely dependent upon truthful testimony, society is ill-served by an "anachronistic" rule which tends to burden and discourage prosecutions for perjury. Proponents of the rule on the other hand, contend that society is well-served by such consequence. Lawsuits frequently engender in defeated litigants sharp resentment and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty and spiteful retaliation in the form of un-

The two-witness rule thus prevents a perjury conviction based solely on a swearing match between the defendant and a single government witness.

A corollary of the two-witness rule is the inconsistent statement rule, a much-criticized rule of pleading and proof that applies when the defendant himself has made two or more contradictory sworn statements. The rule has two prongs, one applying to the indictment and one to the proof required of the prosecution. The indictment must specify which of the defendant's inconsistent statements is alleged to be false; it cannot simply charge that, as a matter of logical necessity, one of them was false.[21] In proving the falsity of the statement charged, moreover, the prosecution must adduce some corroboration in addition to the defendant's sworn contradictory statement.[22]

The extent to which these common law evidentiary rules actually

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founded perjury prosecutions . . . . The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.

323 U.S. at 608-10. *See also* United States v. Diggs, 560 F.2d 266, 269 (7th Cir.), *cert. denied*, 434 U.S. 925 (1977) (two-witness rule still applies to prosecutions under the General Perjury Statute after passage of the False Declaration Statute).

21. *See* United States v. Buckner, 118 F.2d 468, 470 (2d Cir. 1941).

22. *See* Cuesta v. United States, 230 F.2d 704, 707-08 (5th Cir. 1956) (defendant's sworn oral admission of the falsity of his sworn written application for registry as an alien was not sufficient evidence of perjury without corroboration of falsity); United States v. Nessanbaum, 205 F.2d 93 (3d Cir. 1953) (dictum); McWhorter v. United States, 193 F.2d 982 (5th Cir. 1952); *see* MODEL PENAL CODE § 241.1 Comment 8.

It would appear that the seminal case from which the federal rule evolved was systematically misread. *McWhorter* cited United States v. Wood, 39 U.S. (14 Pet.) 430, 438 (1840), for the rule that proof of defendant's contradictory sworn statements alone is insufficient to prove perjury. 193 F.2d at 983. Yet *Wood* does not support that rule. In *Wood*, the defendant was charged with perjury in preparing invoices. The proof of falsity was limited to written correspondence from the defendant. No corroborating witness testified. The Court noted the existence of the two-witness rule, but held that the purpose of the rule was satisfied by the evidence presented, which came from the defendant himself. In dictum, the Court cited *Rex v. Knill* (referred to in Rex v. Harris, 5 Barn. & Ald. 926, 929 (1822)) for the rule that a single witness is sufficient to establish perjury if he testifies that the defendant testified to contradictory statements. In *Knill*, the defendant was charged with having committed perjury in testimony before the House of Lords. The defendant had testified inconsistently before a committee of the House of Commons. The evidence was limited to proof of the contradictory oaths. The conviction was affirmed despite the absence of a second witness, the court holding that contradiction by the party himself was sufficient. In *Rex v. Harris*, the court reversed a conviction upon similar facts because the prosecution had not specified in the charge which of the two statements was false, but had simply alleged that they were inconsistent and that one or the other must have been false. The *Harris* court reasoned that the ambiguity of the charge would not permit the defendant to plead acquittal in the suit as a bar to a subsequent charge of having committed perjury in making one or the other of the statements alone.

Although *United States v. Wood* does not establish that a defendant's sworn contradictory statements alone are insufficient to prove the falsity of his testimony, post-*Wood* decisions in England did hold that the defendant's sworn inconsistent statement alone was insufficient to satisfy the two-witness rule. R. v. Wheatland, 8 C.& P. 238 (1838); *see generally* 11 HALSBURY'S LAWS OF ENGLAND § 950 (4th ed. 1976) and cases cited therein; 12 HALSBURY'S STATUTES 192 (4th ed. 1985) (Perjury Act of 1911 § 13). However, *McWhorter* and its progeny apparently ignored the effect of the rules announced in *Wood*, i.e. that, although the prosecution is required to charge and prove which of the two inconsistent statements was false, once the prosecution charges that one of the statements is false, the

impair federal prosecutions for perjury is uncertain. Critics of the General Perjury Statute have argued that the two-witness rule and the inconsistent statement rule seriously impede federal perjury prosecutions.[23]

The rules have also been subject to theoretical challenge. Discounting any special problem in regulating perjury, critics argue that the two-witness rule requires corroboration that is unnecessary for proof of other, more serious, crimes.[24] They see the inconsistent statement rule as pointlessly forcing the prosecutor and the jury to guess which statement was false when, as a matter of logic, one of them must have been.[25] From the critics' point of view, prosecutorial efficiency and logic triumphed with the passage of the False Declaration Statute.

B. *The False Declaration Statute*

The False Declaration Statute prohibits false swearing in federal court and grand jury proceedings.[26] Congress enacted the statute as part of the Organized Crime Control Act of 1970 with the announced intention of making perjury convictions easier to obtain than they had been under the General Perjury Statute,[27] thereby improving the reliability of evidence given in federal court and grand jury proceedings

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defendant's contradictory statement is sufficient under the two-witness rule to establish falsity.

The inconsistent statement rule was not followed in several state cases, and Wigmore opined that it was not the prevailing rule in non-federal jurisdictions. WIGMORE, EVIDENCE § 2042.

Just as the two-witness rule acquired a new rationale after its original rationale withered away, *Cf.* O.W. HOLMES, THE COMMON LAW 32 (M. Howe ed. 1963) ("[W]hen ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them . . . .") the inconsistent statement rule also finds support in other arguments. One such justification is that inconsistent statements do not necessarily imply perjury. A witness may testify inconsistently at different times because his recollection or opinion changed in the interim or because of mistake or misunderstanding. Mere proof that the defendant testified inconsistently does not establish that he made either statement without a belief that it was true. Despite this justification, however, the inconsistent statement rule might prove frustrating in rare cases in which the nature of the inconsistency makes it clear that the witness uttered an intentional falsehood but the prosecution has no independent proof as to which of the statements was false in order to satisfy the two-witness rule.

23. As evidence they cited the relative paucity of federal prosecutions for perjury.

24. *See* WIGMORE, EVIDENCE § 2041 ("In modern times, cogent reasons have been given for believing that the rule has outlived its usefulness."); *New York Law Revision Commission, 1935 Report,* Legis. Doc. 322 (1935).

25. *See* United States v. Goldberg, 290 F.2d 729, 734 n.1 (2d Cir.), *cert. denied,* 368 U.S. 899 (1961) ("It is hard to see why in a case where, e.g., two or more witnesses testified that the defendant, repeatedly and under varying cirmustances, had made statements differing from his sworn testimony, a jury could not be convinced beyond reasonable doubt that the defendant did not believe that latter to be true."). *See also,* WIGMORE, EVIDENCE § 2043; MODEL PENAL CODE § 241.1 Comment 9.

26. 18 U.S.C. § 1623 (1982). Subsection (a) provides as follows:

> (a) Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The statute also prohibits the use of false documents in federal court and grand jury proceedings. This article will discuss only the provisions relating to false swearing. It could be argued that the use of false documents evidences a greater degree of conscious intention to mislead and so is not subject to the problems discussed in this article.

27. *See infra* note 125 and accompanying text.

against organized crime figures.[28] The False Declaration Statute was to make convictions for perjury more easy to obtain by defining a new species of perjury, false declaration, to which the "outmoded" evidentiary rules of the General Perjury Statute would not apply.[29] The premise of the legislation was simple: by increasing the likelihood that a perjurer would be convicted, the statute would increase the risks associated with perjury and thereby reduce its occurrence.[30] It is, of course, this premise that is in doubt, given the potential counterproductivity of perjury statutes.

The elements of the False Declaration Statute are as rigorous as those of the General Perjury Statute, although there are some changes in operative language. The False Declaration Statute prohibits a federal witness from knowingly[31] making a "false declaration." The defendant

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28. *Id.*

29. *See supra* note 14. "Title IV eliminates outmoded evidentiary restrictions in prosecutions of those who give false testimony in grand jury or court proceeding [sic]." *Hearings Before the Sub-Committee on Criminal Laws and Procedures of the Senate Committee on the Judiciary on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292,* 91st CONG. 1ST SESS. 3 (1969) [hereinafter *Hearings*] (remarks of Sen. McClellan).

30. In committee hearings, witnesses favoring the legislation testified that if the government could more easily obtain convictions for perjury, witnesses would be less likely to succumb to illicit pressure to testify falsely. Government prosecutors were said to have been often frustrated by witnesses who testified favorably to the government in grand jury proceedings, then changed their story because of intimidation or for other reasons at the ensuing criminal trials. The government wanted its own counter-pressure, a licit threat with which to confront the wavering witness. In addition, it was argued that making perjury convictions easier to obtain would permit the government to enforce the immunized witness's obligation to testify truthfully under the Act's witness immunity provisions. The immunity provisions contained in the Organized Crime Control Act of 1970 are found at 18 U.S.C. § 6002 (1986). It was thought that facilitation of perjury prosecutions was essential to insure truthful testimony by immunized witnesses:

> The criminal law must offer more effective deterrents against false statements. The integrity of the trial depends on the power to compel truthful testimony and to punish falsehood. Immunity can be an effective prosecution weapon only if the immunized witness then testifies truthfully. Perjury statutes provide criminal penalties for false testimony under oath, but the infrequency of their use and the difficulty of securing convictions in perjury cases has limited the effectiveness of this criminal sanction.

REPORT OF THE PRESIDENT'S CRIME COMMISSION, *The Challenge of Crime in a Free Society* (quoted in *Hearings*, *supra* note 29, at 335).

31. The legislative history suggests that the change in the level of intent from "willfully" to "knowingly" was intended to have no substantive effect. *See* S. REP No. 617 at 149 ("language changes have been made in the provision [on intent] as introduced to achieve economy of words"). *Compare* United States v. Stassi, 443 F. Supp 661, 666 (D.N.J. 1977), *aff'd,* 583 F.2d 122 (1978) (rejecting defendant's argument that his statements were not knowingly false, the court said: "the *mens rea* element of 'knowingly' does not apply to whether the statements were false but rather to how they were made. (citations omitted). The requirement dictates that only knowing, intentional or voluntary (as opposed to inadvertant or accidental) statements be the subject of prosecution.") *and* United States v. Watson, 623 F.2d 1198, 1206 (7th Cir. 1980) (upholding refusal to give jury instruction that false declaration must be willful) *with* United States v. Gross, 511 F.2d 910, 914-15 (3d Cir.), *cert. denied,* 423 U.S. 924 (1975) (noting that the *mens rea* element was changed, without comment on the substatntive effect of the change) *and* United States v. Lardieri, 497 F.2d 317, 320 (3d Cir. 1974) (approving instruction for prosecution under subsection (a) stating that "knowing" means with knowledge of the falsity of the statement). This question will be discussed further in Part II-A.

In contrast to the General Perjury Statute, 18 U.S.C. § 1621 (1982), the witness's "be-

must have knowledge of the falsity of the statement.[32] Consistent with prior law, the statute explicitly requires the prosecution to prove that the matter asserted in the defendant's statement was objectively false.[33] The lightening of the prosecutor's burden occurred not in the elements of the crime but in the evidentiary rules.

1. Relaxation of Evidentiary Rules

Subsection (e) of the statute abandons the two-witness rule altogether by providing that proof of false declaration need not be by any particular number of witnesses or type of evidence.[34] The government need only prove the elements of the crime beyond a reasonable doubt.

This section permits proof of the falsity of the defendant's testimony to be established by the uncorroborated testimony of a single witness, making proof of false declaration similar to that of most other crimes. In theory, subsection (e) also permits a conviction based solely on an inconsistent statement made by the defendant, whether sworn or not, if evidence of such a statement would permit the trier of fact to find the sworn statement to have been false beyond a reasonable doubt.

While the foregoing provision permits the government to convict a defendant of false declaration based solely on the witness's inconsistent statement, it does not solve the problem presented by the need to choose which of two inconsistent statements is charged to be false. This matter is taken up in subsection (c) of the statute, which lessens the government's pleading and proof requirements in cases in which the defendant has made inconsistent statements under oath. Under the statute, an indictment or information sufficiently charges false declaration by alleging that the defendant knowingly made two or more sworn declarations "which are inconsistent to the degree that one of them is necessarily false . . . ."[35] The prosecution need not allege which of the statements was false. Likewise, at trial the prosecution need not prove which of the two inconsistent declarations was false.[36] Proof of their inconsistency alone is sufficient to establish that at least one of them was false.[37]

2. Defenses

The False Declaration Statute provides for two defenses to charges

lief" in the truth of the statement is referred to only once, in the inconsistent statement provision discussed below.

32. United States v. Dudley, 581 F.2d 1193 (5th Cir. 1978). *But see infra* Part II-C-1-a (discussion of the inconsistent statement provision in which such knowledge may not need to be proved when the witness has testified inconsistently).

33. United States v. Smith, 538 F.2d 159 (7th Cir. 1976).

34. "Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence." 18 U.S.C. § 1623(e) (1982).

35. 18 U.S.C. § 1623(c) (1982).

36. *Id.*

37. *Id.* This provision reverses the *McWhorter* rule.

made under the statute. As an incentive to correct false testimony,[38] the statute permits an affirmative defense of recantation to a charge of false declaration. Recantation, or retraction, refers to the witness's statement that his previous testimony was false. A defense of retraction or recantation was not recognized under the General Perjury Statute. Although some common law decisions barred conviction for perjury if the defendant had corrected the falsehood in the same proceeding in which it had been given,[39] in *United States v. Norris*,[40] the Supreme Court held that the crime of perjury was "completed" at the time of the false utterance and that recantation was no defense to a charge of perjury under the federal statute.[41]

Subsection (d) changes the Norris rule for the crime of false declaration:

> (d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.[42]

The recantation provision was modeled on a similar provision in the New York criminal code.[43] The Model Penal Code contains a similar retraction provision.[44] Under both the New York and Model Penal Code perjury statutes, the defense, if successful, bars prosecution for perjury. But because the False Declaration Statute did not displace the General Perjury Statute, the defense afforded by its recantation provision does not apply to prosecutions under the General Perjury Statute.[45]

The statute provides an additional affirmative defense to a charge of having made inconsistent sworn statements. This defense is set out in subsection (c) which provides that it "shall be a defense to an indictment

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38. "[The recantation provision] serves as an inducement to the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk of prosecution by doing so." 2 U.S. CODE CONG. & ADMIN. NEWS 4024 (1970). *See also* same source at 4008, 4023 (the sole purpose of the recantation defense is to encourage the discovery of truth in judicial and grand jury proceedings) United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 954 (1980); United States v. Lardieri, 506 F.2d 319, 324 ("Section 1623 deters perjury in the first instance by punishing it, and encourages the correction of false testimony by barring prosecution if a witness recants before he knows his lie will be exposed or before the proceeding has been substantially affected.") United States v. Denison, 663 F.2d 611, 617 (5th Cir. 1981).

39. *See* WHARTON'S CRIMINAL LAW § 627 and cases cited therein.

40. 300 U.S. 564, 574-76 (1937).

41. *Id.*

42. 18 U.S.C. § 1623(d) (1982).

43. This provision adopts in modified form a New York statute, N.Y. PENAL LAW § 210.25 (McKinney, 1988); 2 U.S. CONG. & ADMIN. NEWS, 4023-24 (1970).

44. "No person shall be guilty of an offense under this Section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding." MODEL PENAL CODE, § 241.1(4) (1980).

45. *See infra* notes 118-19.

or information made [under subsection (c)] that the defendant at the time he made each declaration believed that the declaration was true."[46] The relationship between this defense and the government's affirmative obligation to prove that the defendant knowingly made a false statement is discussed in the next subsection.

C. *Treatment of Inconsistent Testimony Under the Federal Perjury Statutes*

As part I of the article suggested, perjury is difficult to regulate in part because of the conflict between the deterrence and mitigation goals of the justice system: to inhibit perjury is to discourage rectification of testimonial error. Inconsistent testimony is especially sensitive to this conflict because, although it can provide strong evidence of perjury, it is nevertheless the only way in which a witness can correct the harm done by his previous testimony. As one would expect, therefore, the deterrence and mitigation interests of perjury law clash most clearly in the statutory treatment of inconsistent testimony.

The two federal perjury statutes treat inconsistent testimony in opposite ways. Under the General Perjury Statute, the two-witness rule and the inconsistent statement rule tend to make testimonial correction less risky for a witness. The government may charge that either statement was perjurious, but is required to corroborate by some additional evidence the falsity of the statement charged.[47] The government also bears the burden of proving the defendant's lack of belief in the false statement.[48] Nevertheless, by refusing to acknowledge the defense of recantation,[49] the General Perjury Statute discourages testimonial corrections whenever the witness believes that the correction would corroborate other evidence of the falsity of the former testimony, thereby satisfying the two-witness rule.

The False Declaration Statute reverses this approach: under subsection (c) certain forms of inconsistent testimony constitute conclusive evidence of falsehood, while under subsection (d) other forms of inconsistent testimony will give the witness a defense of recantation. The False Declaration Statute thus makes testimonial revision less risky, but only if it can be characterized as recantation. Otherwise, it is more risky because of the reduced pleading and proof requirements of subsection (c).

In order to analyze the combined behavioral effects of these statutes, it is necessary to look more closely at the basis for the radically different treatment accorded recantation and other inconsistent statements under the False Declaration Statute. The following analysis suggests that these two categories of testimony are, for most practical purposes, equivalent. They are treated differently not because they are of different values to the judicial system but because they symbolize the

46. 18 U.S.C. § 1623(c) (1982).
47. *See supra* note 23.
48. *See supra* note 18.
49. *See supra* note 43.

two sides of the unresolved conflict between the deterrence and mitigation policies of the statute.

1. The Inconsistent Statement Provision

By permitting the government, in effect, to plead and prove false declaration in the alternative when the defendant has testified inconsistently, the inconsistent statement provision[50] prevents a defendant who obviously lied on one of two occasions from avoiding prosecution because the trier of fact cannot determine upon which occasion he lied. The provision rests on the tautology that when a witness utters "two or more declarations, which are inconsistent to the degree that one of them is necessarily false [sic],"[51] the witness has uttered a false declaration. While the requisite degree of inconsistency alone might permit an inference that one of the statements was false, however, it does not establish that the falsity was intentional.[52] The inference of intent will depend

50. (c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilable contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentance of this subsection that the defendant at the time he made each declaration believed the declaration to be true.

18 U.S.C. § 1623(c) (1982).

Compare the inconsistent statement provision of the Model Penal Code:

Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such a case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

MODEL PENAL CODE § 241.1(5) (1980).

51. 18 U.S.C. § 1623(c) (1982). One presumes that the adverb "necessarily" modifies "is" rather than "false." Only self-contradictory statements are necessarily false.

52. It should be noted that the standard of inconsistency set forth in the statute is not as self-evident or easy to apply as one might imagine. Consider:

1. No two non-contemporaneous statements purporting to describe a witness's recolleciton of an event can ever meet the statutory requirement that one of them was necessarily false when made. Regardless of the form that factual testimony takes, it can only describe the witness's contemporaneous recollection. An exception might be statements of contemporaneous perception. But no two of these could be contradictory because they would describe perceptions at different times. "The light was red" is understood to mean "My present recollection is that the light was red," although the latter expression conventionally suggests that the recollection is weak. Indeed, a witness's attempt to testify to anything other than his recollection of his perceptions would ordinarily be inadmissible as either opinion or speculation. *Cf.* FED. R. EVID. 602 (requirement that testimony be based on witness's personal knowledge); 701 (lay opinions inadmissible unless based on perception). Because statements of past facts describe only the witness's current recollection, non-contemporaneous factual statements made by the same witness about the same event actually describe different mental states. Thus, no two statements

instead upon such factors as the nature of the matter testified to, the

about a witness's recollection can ever come into direct conflict. *See* United States v. Flowers, 813 F.2d 1320 (4th Cir. 1987), in which the court held that two contradictory statements concerning an event were not inconsistent within the meaning of the statute when the witness also testified that his memory of the event had changed.

Such a strict reading of "necessarily false" in the inconsistent statement provision would render it nugatory. In order to avoid the problem of under-inclusiveness that this argument creates, one might argue that the statute refers only to inconsistency between the statements of matter recollected. This reading, however, quickly leads to problems of over-inclusiveness because it conflicts with the central idea that witnesses are asked about and testify to their recollection of events rather than to the events themselves. It strains credulity to believe that subsection (c) is to come into play whenever a witness's recollection changes.

The Model Penal Code seeks to avoid this problem by using the idea of rational incompatibility. MODEL PENAL CODE Comment 241.1(8) (1980):

> Finally, it should be noted that the word 'inconsistent' is preferable to 'contradictory' in the statutory formulation, since statements may be rationally incompatible without literal contradiction. It is, according to the definition of 'statement' in Section 241.0(2), the total impact of the 'representation' made by the defendant that is to be considered in a perjury prosecution. Inconsistent representations need not literally contradict one another in order for the total picture conveyed by the witness to be quite different from one occasion to another.

The total picture test, however, does not meet the statutory standard that requires one of the statements to have been "necessarily" false. Although this test would overcome the problem of the under-inclusiveness of logical inconsistency, it would create the opposite problem of overbreadth by loosening the definition far too much. The "total picture" of a witness's testimony can change dramatically when facts are added or different language is used, without any false statements being uttered. Moreover, because reasonable minds can often differ about whether two statements are rationally inconsistent, such statements would not be "necessarily" inconsistent as required by the federal statute.

The possibility of rapid memory loss would never seem to be "necessarily" excluded, as the statute seems to require. This problem of under-inclusiveness can be avoided only by expanding the notion of "necessarily false" to include weaker forms of inconsistency, which would risk removing the certitude that the statutory standard provides.

2. Consistency or inconsistency may not be self-evident from the statements themselves but may instead depend upon facts unexpressed in the statements but assumed to be true, for example, "Mr. Bush attended the meeting" and "The President did not attend the meeting." These statements are inconsistent because of the unexpressed fact that Mr. Bush is the President. Such essential unexpressed facts may not, however, always be so clear or undisputed. If the unexpressed facts were uttered by the defendant under oath, they should be included in the indictment: the provision refers to two or more inconsistent statements, apparently covering the situation in which no two of the defendant's statements are inconsistent without taking into account additional statements. For instance, "The President attended the briefing," "The President did not know of the plan," "The plan was disclosed at the meeting," and "The President knew of all plans disclosed at the meeting." No two of these statements contradict each other, but one statement of the four must be false.

The statute's failure to specify whether and to what extent extraneous information can be taken into account in determining the degree of inconsistency the statements contain is much more troublesome when the extraneous evidence does not come from statements made by the defendant and the defendant does not admit the truth of the extraneous evidence necessary to such a determination. Because it acts as a substitute proof of falsity, which the government would otherwise be required to establish to the jury, the inconsistent statement provision should not apply to statements whose inconsistency depends upon the acceptance of extraneous evidence whose truth is open to rational question.

3. The inconsistent statement provision does not clearly define where one statement leaves off and the next begins. This failure leads to ambiguity when a witness's testimony might be characterized as either a single self-contradictory or incoherent statement or as two inconsistent statements. The statute does not refer to the time between the inconsistent statements, making it possible that it either reaches corrections made in the same breath or does not reach corrections made days later.

The Model Penal Code's solution to this problem is to define "statement" to include

specificity of the testimony, the witness's certainty and demeanor on the stand, the passage of time between the statements, the narrative context of the statements, the clarity of the questioning, the surrounding facts assumed by the trier to be true, and the defendant's explanation, if any, for the inconsistency. Thus, proof of inconsistent statements *per se* does not establish the *mens rea* element of the false declaration statute. Yet, to an extent not yet made wholly clear by judicial construction, the inconsistent statement provision permits proof of inconsistency to replace proof of knowingly false declaration.

Because the degree of inconsistency, logical or rational, is the same for innocent as well as perjurious inconsistencies, the only way to rescue innocent revisions from the operation of the statute is to require the prosecution to prove that the false statement in a pair of inconsistent statements was knowingly false when made. Two statutory provisions bear on the question. Subsection (a) in defining false declaration refers to one who "knowingly makes any false material declaration."[53] This provision requires the government to prove that the defendant knew of the falsity of the statement.[54]

But the inconsistent statement provision permits the burden of production of evidence on this element of the offense to be shifted to the defendant once inconsistent statements are proved. That provision refers to one who "has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false." The sentence is ambiguous in that this "knowingly" might refer to the making of the statements, the logical inconsistency between the statements, or the actual falsity of one of the statements. Subsection (a) implies that "knowingly" in subsection (c) refers to the actual falsity of one of the statements, thus requiring the prosecution to prove knowledge in addition to inconsistency. If "knowingly" in subsection (c) refers only to the making of the statements or the fact of their inconsistency, then subsection (a)'s *mens rea* requirement would be evaded.

Yet, one court has indeed held that "knowingly" in subsection (c) refers only to the making of the statements. In *United States v. Stassi*,[55] the defendant was convicted of having made inconsistent sworn statements in a guilty plea proceeding and in an affidavit on a motion to vacate the plea. The court rejected the defendant's argument that the government had not proved that his statements were knowingly false,

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the total impression left by the witness's testimony. "[S]tatement means any representation . . . ." MODEL PENAL CODE § 241.0(2). A representation is:

> [T]he total impression conveyed by a sequence of declarations by the accused rather than the literal content of a single sentence taken from the sequence . . . . Thus, even though a single declaration in the course of a series of questions was false, the 'representation' for purposes of perjury would be the total impression conveyed by the answers as a whole.

MODEL PENAL CODE § 241.1 Comment b.

53. 18 U.S.C. § 1623(a) (1982).

54. *See* United States v. Crippen, 570 F.2d 535 (5th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979).

55. 443 F. Supp 661 (1977).

stating: "[T]he *mens rea* element of 'knowingly' does not apply to whether the statements were false but rather to how they were made. . . . The requirement dictates that only knowing, intentional or voluntary (as opposed to inadvertent or accidental) statements be the subject of prosecution."[56] The court held that, unless a defendant adequately raises the affirmative defense of belief in the truth of the statements, the government need not prove that they were made with knowledge of their falsity.[57] *Stassi* holds that proof of inconsistent statements alone discharges the government's *prima facie* burden of proof of the element of intent.[58] This holding implies that the defendant is not even entitled to an instruction on the defense of belief in the truth of the statements unless he adduces some evidence of that intent.

The result of *Stassi* is that, upon the government's proof that the defendant made sworn inconsistent statements, the burden of producing evidence bearing on knowledge of falsity shifts to the defendant.[59] Although knowledge of falsity is an element of the offense of false declaration, *Stassi* requires the prosecution to prove knowledge only if the defendant adequately raises the defense that he believed in the truth of each statement when it was made.[60] Shifting the burden of producing evidence to the defendant as to an element of the crime before the government has proved that element is of doubtful constitutionality.

While a statute's allocation of the burdens of proof and production of evidence offends a defendant's fifth amendment due process right if it has the effect of relieving the government of proving one of the elements of the crime charged,[61] the Court has not determined whether or

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56. *Id.*

57. *Id.* at 667.

58. *Id.*

59. In addition to knowledge and materiality, the government must show falsity. Defendant argues convincingly that the government has not proved beyond a reasonable doubt that the defendant knew that the June 22, 1976 affidavit was false when it was signed and sworn to. The court agrees. Indeed, the government's burden in this situation is greater than even the defendant suggests. Once a defendant raises the affirmative defense of his belief in the truth of a statement, the burden is on the government to disprove this belief beyond a reasonable doubt. [citation omitted] However, success on this issue does not serve to exonerate the defendant from the charges against him. Under § 1623(c), the government may prove that one of the statements was necessarily false merely by introducing two irreconcilably contradictory declarations to the point in question. [citation omitted] *The defendant in the two-statement situation must then demonstrate or at least raise the issue that he believed each declaration to have been true at the time it was made.* [citation omitted] While the defendant has sufficiently demonstrated his belief in the veracity of the June 22, 1976 statement, he has not presented any evidence toward his belief that the June 2, 1975 declarations were true when they were made. *Indeed the argument defendant puts forward which tends to show his belief in the veracity of the latter statement also demonstrates the defendant's belief in the falsity of the former declarations.*

Stassi, 443 F. Supp at 666-67 (emphasis added). This suggests that, to be entitled to an instruction on the belief defense, the defendant must meet the burden of production of evidence on the issue.

60. *Id.*

61. The fifth amendment due process clause, U.S. CONST. Amend. V, requires that the government prove each element of the offense charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970) (the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact* necessary to consti-

in what circumstances shifting the burden of production of evidence bearing on an element of a crime might violate due process.[62] Such a presumption might well be held violative of due process because, while it operates, it has the prohibited effect of relieving the government of

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tute the crime with which he is charged." [emphasis added]). *See also* Morissette v. United States, 342 U.S. 246 (1952):

> [T]he trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act . . . . A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. [footnote omitted]. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.

Morissette, 342 U.S. at 274-75.

Evidentiary presumptions that have the effect of relieving the prosecution of this burden have been held to violate due process. *See also* Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510, 514 (1979); Mullaney v. Wilbur, 421 U.S. 684, 698-701 (1975) (State may not redefine elements of crime as punishment factors thereby relieving the prosecution of the burden of proving them) *Cf.* Patterson v. New York, 432 U.S. 197 (1977) (conviction of second degree murder does not violate due process by placing burden on defendant to prove affirmative defense where defense does not negative any fact essential to conviction of crime, although there are limits beyond which the state cannot go in reallocating burdens of proof by labeling elements of the crime as affirmative defenses.)

In conducting this analysis, the Court has distinguished between mandatory and permissive presumptions. A mandatory presumption may be either conclusive or rebuttable. A conclusive mandatory presumption "removes the presumed element from the case once the State has proven the predicate facts giving rise to the presumption." Francis v. Franklin, 471 U.S. at 314 n.2. A conclusive mandatory presumption as to an element of the crime is unconstitutional. Sandstrom v. Montana, 442 U.S. at 517. A rebuttable mandatory presumption requires the jury to find the presumed element upon proof of the predicate facts unless the defendant persuades the jury otherwise. Francis at 314. Such a presumption is also unconstitutional.

Stassi denies that the statute creates a mandatory presuption by affirming that the prosecution must prove knowlege of falstity. "Once a defendant raises the affirmative defense of his belief in the truth of a statement, the burden is on the government to disprove this belief beyond a reasonable doubt." *Stassi*, 443 F. Supp at 666-67.

A permissive presumption permits, but does not require, the trier of fact to infer an element of the offense from proof of some other fact. Such presumptions are constitutional so long as there is a rational connection between the element inferred and the fact proved. *Francis* at 314-15; Ulster County Court v. Allen, 442 U.S. 140, 157 (1979).

62. A mandatory presumption may shift the burden of production by requiring that the jury find the presumed fact unless the defendant produces some evidence of its nonexistance, and only thereafter putting the burden of proof of the element on the prosecution. The Court has not determined under what circumstances such a presumption shifting the burden of production to the defendant would be unconstitutional. Francis v. Franklin, 471 U.S. at 314 n.3; Patterson v. New York, 432 U.S. at 230 (Powell, J., dissenting); *see also* WIGMORE, EVIDENCE § 2487, 2512.

Characterizing the element as a defense on which the defendant has the burden of proof has been held to be unconstitutional when the element is a natural element of the crime charged, as has characterizing the element as a factor to be considered upon sentencing. *See* Mullaney v. Wilbur, *supra* note 62. The defendant's belief in the truth of the statement is nothing more than the negative of the element of knowledge of the falsity of the statement. The False Declaration Statute cannot, under the guise of establishing an element of the affirmative defense of belief, constitutionally compel the defendant to shoulder the burden of negativing the element of knowledge of falsity.

the burden of proving an element of the offense.[63] Moreover, under *Stassi*, in order to discharge the burden of production, the defendant must introduce some evidence of his belief in the truth of both of his statements.[64] This almost certainly requires the defendant to take the stand, waiving his fifth amendment privilege against self-incrimination.

Regardless of the constitutionality of the statute under the *Stassi* rule, there is no doubt that a witness will face a difficult task in attempting to invoke the defense of belief in the truth of the inconsistent statements. This chilling effect applies to innocent witnesses contemplating testimonial corrections as well as to potential perjurers. The witness must produce some evidence that he believes both statements to have been true when made. Any evidence tending to show that the witness believed one of the statements tends to make it less likely that he believed the other one.[65] The witness will usually have no objective evidence of his belief; his personal credibility will be determinative of the issue.

Congress expressly denied that the inconsistent statement provision relieves the government of the burden of proving intent to falsify.[66] *Stassi*'s may have read the provision differently because the court could not understand how the government could discharge such a burden when, as is likely, one of the inconsistent statements was true when made. It is impossible for the government to prove a defendant's knowledge of falsity of a true statement. The government might, however, prove with respect to each statement that *if* it was false, then the defendant knew that it was false when he made it.

It is suggested that the proper reading of the statute is that the defendant may be convicted of false declaration upon proof beyond a reasonable doubt: (1) that he made sworn statements [otherwise qualifying] that were so inconsistent that one of them must have been false when made and, (2) that whichever one was false, the defendant must have known it to have been false when made. This formulation would

63. *But see Mullaney*, 421 U.S. at 703 n.31 (suggesting that shifting the burden of production to the defendant may be subject to less stringent due process requirements than shifting the burden of persuasion); *Patterson*, 432 U.S. at 231 in which Justice Powell opines that shifting the burden of production may be permissible on such issues as malice, citing MODEL PENAL CODE § 1.13, comment, p. 110 (Tent. Draft No. 4, 1955). The Official Draft of the Model Penal Code, however, seems to limit permissible shifts in the burden of production to affirmative defenses, not elements of the crime. MODEL PENAL CODE § 1.12(1) & (3).

64. *Stassi*, 443 F. Supp at 666-67. It is possible that a burden of production could be met by evidence put in by the prosecution or by inferences from other evidence put in by the defendant. *See supra* note 63. However, *Stassi* implies that discharging this burden would require evidence of more than the inference that any witness under oath believed that what he said was true.

65. *Id.*

66. Under present law, even if a witness makes two statements which are so patently contradictory that one or the other must be false, the prosecution must nevertheless prove which of the statements is false and then prove an intentional falsehood. In accord with the commission recommentdation, the committee rightfully retained the requirement that an intent to falsify be shown. However, if one of two statements logically must be false, then title IV recognized that fact. 116 CONG. REC. 589 (1970).

permit alternative pleading and proof without changing the government's affirmative burden of proof and production as to any of the elements of the offense.

If this reading is correct, however, then the statutory defense that the defendant believed each statement to have been true when made is superfluous because it simply denies one of the elements of the crime that the prosecution must prove anyway. The defendant cannot prove that he believed to be true what the government proves that he knew to be false.[67] If the government fails to meet the burden of proving that the defendant must have known of the falsity of the false statement when he made it, the defendant should be acquitted.

2. The Statutory Treatment of Recantation

The recantation provision permits the witness to bar prosecution for a false declaration by making a timely admission that the declaration was false. In contrast to subsection (c)'s disincentives for inconsistent statements, the recantation provision is supposed to serve as "an incentive to the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk of prosecution by doing so."[68]

Two problems attend the recantation defense: its inconsistency with the inconsistent statement provision and the judicial and statutory barriers that have frustrated its achievement of its legislative purpose.

(a) *Recantation versus Inconsistent Statement*

The sharp contrast between the statute's treatment of "inconsistent statements" and "recantations" requires courts to differentiate between the two. But such a distinction is difficult to draw. A recantation obviously denies the truth of the statement recanted. Since any recantation is inconsistent with the statement recanted, every recantation and the statement it recants satisfy subsection (c)'s definition of inconsistent statements: either the recantation or the statement recanted must necessarily be false. Conversely, every statement admits, at least implicitly, the falsity of any contradictory statement previously made; the latter of any two inconsistent statements thus implicitly recants the former. In substance, all recantations are inconsistent statements, and vice versa.

The statute does not permit both subsections to be applied to the same pair of statements made in the same proceeding.[69] If recantations

67. *See* MODEL PENAL CODE § 241.1 Comment 3 (1980).

68. 2 U.S. CODE CONG. & ADMIN. NEWS 4024 (1970).

69. Subsection (c) will not conflict with subsection (d) unless both provisions could apply to the same statement. Since a recantation must occur within the same continuous proceeding and must be timely, for example, only subsection (c) can apply to inconsistent statements made in different proceedings or result from recantation which is untimely.

On the other side, it might be possible to recant without uttering an inconsistent statement. Subsection (c) requires that the inconsistent statements be made under oath, but this is not expressly required by subsection (d) for recantations. Thus, an unsworn recantation would not constitute an inconsistent statement. *See* United States v. Crandall,

were inconsistent statements, then they would not bar prosecution. If inconsistent statements were recantations, then they could not be prosecuted. Courts must therefore endeavor to distinguish the admission required by the recantation provision from a simple inconsistent statement. Federal courts have had numerous occasions to struggle with this problem in cases where defendants charged with having made inconsistent statements sought to characterize them as recantations.

Whether or not a statement constitutes a recantation, i.e. an admission of the falsity of a previous statement, has been held to be a question of law as to which the defendant has no right to a jury trial.[70] In determining whether a statement constitutes a recantation, courts have construed with uncommon strictness the requirement that the defendant admit the falsity of the statement recanted. Although the statute does not so provide, decisions have held that the recantation must be an explicit, unequivocal admission that the prior testimony was false.[71] The requirement that the witness admit the falsity of the prior statement in order to recant effectively has been construed to mean that an attempt at recantation that explained the earlier statement as a mistake or an innocent error is not effective.[72]

These holdings mean that a witness who retracts an earlier inconsistent statement and truthfully explains it as a mistake will not fulfill the requirements of the recantation defense. Such a witness could recant effectively only if she were to [falsely] admit that the earlier statement

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363 F. Supp 648 (W.D. Pa. 1973), *aff'd*, 493 F.2d 1401, *aff'd*, 495 F.2d 1369 (3d Cir.), *cert. denied*, 419 U.S. 852 (1974) (statement given to a prosecutor while the grand jury was in recess held adequate as a recantation because the statement was read to the grand jury when it reconvened, but held not to constitute an effective recantation on other grounds); and United States v. D'Auria, 672 F.2d at 1091. *But see* United States v. Goguen, 723 F.2d 1012, 1017 n.5 (1st Cir. 1983) (suggesting that the statement must be made directly to the grand jury). These decisions suggest that a witness may recant grand jury testimony by letter or other out-of-court statements to the prosecutor.

70. *Goguen*, 723 F.2d 1012 (1st Cir. 1983); *D'Auria*, 672 F.2d 1085 (2d Cir. 1982). Recantation has been held to be a jurisdictional bar to prosectution that must be raised in a motion under FED. R. CRIM. P. 12(b)(2). United States v. Parr, 516 F.2d 458, 472 (5th Cir. 1975); *Denison*, 663 F.2d at 618.

71. United States v. Brown, No. 84-5546 (D.C. Cir. March 24, 1986) (unpublished slip opinion available in LEXIS) (although defendant's answers were sufficiently inconsistent to satisfy subsection (c), the latter answer did not amount to an admission of falsity of the former); *Goguen*, 723 F.2d at 1018 ("[F]or an effective recantation the accused must come forward and explain unambiguously and specifically which of his answers in prior testimony were false and in what respects they were false."); *D'Auria*, 672 F.2d at 1092 (witness must make an "outright retraction and repudiation").

In *D'Auria* the court affirmed the conviction of a grand jury witness whose counsel had unsuccessfully requested permission for the witness to return to the grand jury to "add to and clarify" his grand jury testimony, stating that he had not "completely understood" some of the questions and wished to "come forward with any additional information he could provide." The court held that this was too equivocal to constitute an adequate offer to recant. The court read the statute as requiring that not only the recantation, but also the offer to recant, must admit the falsity of the declaration in question.

72. *See* cases and discussion in note 70. Technically the original statement in such cases was not a false declaration. Apparently for this reason, these decisions imply that a witness may not bar prosecution for making a non-perjurious false statement. If the original statement was intentionally false then subsequent testimony that it was an innocent error is itself a false declaration.

was intentionally false. Despite the legislative intent, the statute thus provides no safe harbor for the honest witness seeking to rectify an innocent error.

The decisions announcing such an interpretation arguably distort the statutory language. The recantation provision requires only that the defendant admit the falsity of the prior testimony, not that she embellish the admission with further affirmative representations explaining how she came to testify falsely. If the defendant offers such an explanation, and it is false, then she may indeed have committed a second false declaration, but that subsequent falsehood cannot change the legal effect of her admission of falsity. The simple acknowledgment that the prior statement was false will remedy any damaging effect it would have had on the proceeding and should be sufficient for the defense of recantation.[73]

Thus far, case law has tried to keep the statute from coming unhinged by holding that a recantation avoids being an inconsistent statement only by making an express allusion to the prior declaration.[74] For example, if the witness first testified that "The light was red," and later testified "My statement that the light was red was false" she would have recanted, whereas if she later testified simply that "The light was not red" she would have uttered inconsistent statements and committed false declaration.[75] Thus, the court in *United States v. Brown*[76] held that a statement that was sufficiently specific to constitute an inconsistent statement contradicting former testimony did not constitute recantation of that testimony because the witness did not also state that the former testimony was false.[77]

It is overwhelmingly likely that witnesses who have testified inconsistently with former testimony would, if asked, also readily admit that the prior testimony was false. Few people will knowingly maintain positions that are so inconsistent that one of them is necessarily false. A witness's failure to make an explicit statement that prior inconsistent statements are false is a failure of form, not substance, and results from the examiner's failure to draw the prior statement to the witness's attention. Thus, the classification of statements as inconsistent statements instead of as recantations depends on the fortuity of the questions asked rather than the answers given.

Such hyperformalism is to be expected when courts are required to discriminate between functionally similar phenomena. Both inconsistent statements and recantations inform the trier of fact that prior testi-

73. A second serious consequence of this interpretation of the statute is that a witness must in effect admit guilt under the General Perjury Statute in order to bar prosecution under the False Declaration Statute.

74. United States v. Brown, No. 84-5546 (unpublished slip opinion).

75. Note that an inconsistent statement can give the trier more information than the formal recantation. Compare: (1) "My statement that the light was red was false"; with (2) "The light was green."

76. No. 84-5546 (unpublished slip opinion).

77. *Id.*

mony was false. Both recantations and inconsistent statements may be either truthful attempts to correct the record or false attempts to deny prior truthful testimony. Both inconsistent statements and recantations leave the trier of fact to figure out which version of the events was true and which was false. Both inconsistent statements and recantations may be motivated by similar fears of exposure or similar desires to correct innocent errors. Yet, because the statute attaches radically different consequences to each, courts are driven to "find" differences between them, implementing an inconsistent policy toward testimonial inconsistency.

The "difference" between the two forms of testimonial inconsistency is symbolic rather than functional and is rooted in the need of perjury law to mediate between the values of deterrence and mitigation. Courts seem to see the difference between inconsistent statements and recantation as similar to the difference between bragging about one's sin and confessing it, a difference in the witness's attitude rather than the substance of the witness's communication. Such courts will sacrifice the mitigative benefits of testimonial correction to achieve the punitive effect of contrition.

The Model Penal Code addresses the similarity of inconsistent statements and retraction in applying its inconsistent statement provision.[78] The Code seeks to rescue testimonial corrections from classification as inconsistent statements provision by defining the term "statement"[79] to be equivalent to the term "representation." This latter term is defined as "the total impression conveyed by a sequence of declarations" and "the total impression conveyed by the answers as a whole."[80] The Code Commentary opines that a witness who changes his testimony in response to a single line of questioning will not be subject to prosecution for inconsistent statements: either he will be deemed to have made only one statement or he will be deemed to have recanted.[81] While superior to the federal scheme, this approach must

78. The Model Penal Code provides:

Inconsistent Statements. Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant.

MODEL PENAL CODE § 241.1.

79. "[S]tatement means any representation, but includes a representation of opinion, belief or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation." MODEL PENAL CODE, § 241.0(2).

80. Comment to the MODEL PENAL CODE, § 241.1.

81. It is not intended, of course, that a defendant who changes his story in response to a single line of questioning thereby will subject himself automatically to prosecution under Subsection (5) . . . [E]ither the definition of "statement" or the retraction defense should come into play to prevent such a prosecution. Indeed, it might be suggested that in order for Subsection (5) to become operative, the declarant's inconsistent statements should either have been given on different occasions or at least pursuant to distinct lines of questioning.

solve the problem of determining where an "occasion" or "line of questioning" ends. Does it end when the interrogator changes topics, when the examination ends, when the cross-examination ends, or when the witness leaves the stand? The proposed solution in Part IV avoids this problem by referring solely to the proceeding in which the statements occur.

(b) *Barriers to Recantation*

The conflicting policies of deterrence and mitigation are not only expressed in distinctions between "bad" inconsistent statements and "good" recantations. The conflict creates inconsistent attitudes toward the recantation defense itself, both in the statutory language and the courts. Congress limited the utility of the defense by erecting formal barriers to its invocation. In addition, most courts have tended to view the defense of recantation as an undeserved gift of grace to the perjurer rather than as a Congressional recognition of the judicial system's interest in obtaining evidence of even intentional misstatement before its tribunals act. As a result, the courts have dispensed the benefit of the defense with a grudging hand, rather than liberally to encourage correction of the record.

The statute requires that a recantation be timely in three ways: it must occur during the same continuous proceeding as the false declaration, it must occur before the false declaration has had a substantial effect on the proceeding, and it must occur before the exposure of the falsity of the declaration has become manifest. While the purpose of these requirements is to encourage rapid recantation, narrow judicial interpretation has severely limited the availability of this defense.

The statutory requirement that the falsehood not have a substantial effect on the proceeding demands an inquiry into whether, as a factual matter, the falsehood has caused the tribunal to take or omit some action in reliance upon the falsehood.[82] In the absence of proof that the falsehood affected the tribunal's process, the defendant presumably should be encouraged to correct prior testimony. Otherwise, avoidable injury to the judicial process could occur.

Decisions construing this provision, however, have precluded inquiry into causation. In *United States v. Tucker*[83] the court held that a witness's false denial of criminal activity had substantially affected a grand jury proceeding by causing the prosecution to grant immunity to another witness in order to obtain the testimony it desired. The defendant argued that, because the grant of immunity was unnecessary, the grant was not caused by the perjury. The court rejected this argument,

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MODEL PENAL CODE § 241.1 Comment 8, n.108.

82. New York precedent before and after enactment of the federal statute provides no guidance as to the meaning of "substantially affect." *Cf.* People v. Ezaugi, 2 N.Y.2d 439, 440, 141 N.E.2d 580, 581, 161 N.Y.S.2d 75, 76 (1957) (suggesting that the deliberative or investigative body must have been misled or deceived by the lie, and that the deception harmed or prejudiced the deliberation or investigation—these are issues of fact).

83. 495 F. Supp 607 (E.D.N.Y. 1980).

holding that the statute does not require a detailed inquiry into the thought processes of grand jurors or into the exercise of prosecutorial discretion.[84]

In *United States v. Krogh*,[85] the court denied a motion to dismiss a prosecution for false declaration made before a grand jury. The defendant argued that an affidavit he had given to the prosecutor recanted the falsehood. The court rejected the defense, finding that the grand jury had acted before the recantation, although the opinion discloses no effect that the false testimony might have had on that action. The court held that false statements are presumed as a matter of law to have been considered by the grand jury and to have substantially affected the proceedings whenever the grand jury has acted following the false testimony.[86]

These holdings establishing a conclusive presumption that testimony has had an effect on the proceeding ignore the language of the statute. If Congress had intended to establish a presumption that any action subsequently taken by the tribunal was substantially affected by the false declaration, it surely could have so provided in the statute instead of using language that stimulates a factual inquiry into proximate cause. The restrictive reading of the statute instead reflects judicial hostility toward the defense of recantation, a hostility that rejects the relatively novel principle of mitigation for the time-honored principle of deterrence.

The recantation must also occur before "it has become manifest that such falsity has been or will be exposed."[87] Decisions interpret this language to mean that it is too late to recant if it has become manifest to the witness that the falsity has been or will be exposed to the tribunal or the government.[88]

This rule leads to disqualification in many cases in which the incentive to recant arose from the witness's fear of exposure. The reason for this rule is unclear. Rejection of recantation in such cases might be based on one of three notions: (1) the information contained in the recantation is of no value to the tribunal; (2) the witness who recants only when facing exposure does not deserve a defense; or (3) to permit such recantations will encourage perjury because the witness will always have an "out" if the perjury is exposed.

The first justification is questionable. Even where the tribunal has

84. *Id.* at 614. This decision seems to hold that the required substantial affect can be found not only in actions of the tribunal, but also in actions of a litigant, i.e. the prosecutor. No warrant for this conclusion was given.

85. 366 F. Supp. 1255 (D.D.C. 1973).

86. *Id.* at 1256. *See also* United States v. Crandall, 363 F. Supp. 648, 654-55 (W.D. Pa. 1973), *cert. denied*, 419 U.S. 852 (1974) (delay of two months in recanting substantially affected grand jury proceeding by depriving it of evidence for that period of time, even though the grand jury was aware of the falsehood before the recantation).

87. 18 U.S.C. § 1623(d) (1982).

88. United States v. Denison, 663 F.2d 611, 615 (5th Cir. 1981); United Staes v. Scrimgeour, 636 F.2d 1019 (5th Cir.), *cert. denied*, 454 U.S. 878 (1981); United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 954 (1980).

heard another witness directly contradict the defendant's prior testimony, the tribunal may be uncertain about which account was accurate. The defendant's recantation would often permit the tribunal to achieve a more certain resolution of the contradiction. Such useful recantations are discouraged by the statutory restriction, to no apparent purpose.

Rejecting such recantations for moral reasons also seems to frustrate the statutory policy of enhancing testimonial reliability.[89] There is little to choose between the morality of a witness who tells the truth initially because of fear of exposure and the morality of a witness who recants later because of a fear of exposure.

The third possible justification has received the most support in judicial opinions.[90] Courts fear that if the exposure requirement were abandoned, perjurers will lie with impunity, secure in the knowledge that if the lie is exposed, they can admit it and avoid prosecution. This fear seems exaggerated, as discussed in Part IV, below.[91]

In addition to the constraints placed upon recantation by Congress, the courts too have displayed a reluctance to adopt the policy justifications of the recantation provision when construing the statute in areas in which it is silent.[92] For example, they have held that the government has no duty to warn a witness that he may recant false statements, and that it has no duty to give a witness who it believes to have testified falsely an opportunity to recant.[93]

Courts have also manifested a distrust of the behavioral effects of the incentives the recantation provision is thought to offer to witnesses.

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89. Speaking of a similar requirement contained in New York law, one judge said: "[S]ince the recantation rule's purpose is not to reward or punish the liar but to get the truth into the record, the perjurer's motive for recanting has nothing to do with it at all." People v. Ezaugi, 2 N.Y.2d at 444-45, 141 N.E.2d at 583-84, 161 N.Y.S.2d at 79 (dissenting opinion). *But see* MODEL PENAL CODE § 5.01(4) and accompanying Comment (denying a withdrawal defense to the crime of attempt where the withdrawal resulted from probability of detection or other factors that made accomplishment of the criminal purpose more difficult).

90. *See infra*, text accompanying notes 95-97.

91. The situations that give rise to disqualification because of exposure should be noted. Courts have held that recantation comes too late if it comes after the prosecutor warns the defendant that he may be charged with perjury. Thus, a prosecutor may apparently cut off any possibility of recantation by confronting a suspected perjurer with his falsehood immediately after his testimony. *See* United States v. Lardieri, 506 F.2d at 324.

Exposure becomes manifest in other situations in which it would seem inappropriate to deny the recantation defense. For example, if the witness first makes an inconsistent statement, and then, when it is drawn to his attention, more explicitly recants his original declaration, the recantation might be deemed to be too late because exposure of falsity became manifest to the witness by reason of his inconsistent statement. Another possibility of a disqualifying "manifestation" is the disclosure to a witness by his counsel that the untruth will be revealed to the tribunal if the witness does not do so himself. *See* discussion below at Part III.

92. *Id. See Denison*, 663 F.2d at 617 ("Section 1623(d) balances the need to encourage a witness to correct his testimony against the need to prevent his perjury at the outset. We see no reason to disturb this balance by broadening the immunity accorded to a witness who recants . . . ."). *See also* United States v. Lardieri, 506 F.2d at 324 (making a similar argument about whether grand jury witnesses must be given notice of their ability to recant).

93. *Id.*

In *United States v. Moore*,[94] the court construed the relationship between the two prerequisites to recantation, lack of effect on the tribunal and lack of exposure of the falsehood. The statute requires that the recantation must occur "before the false declaration has had a substantial effect on the proceeding, *or* before the exposure of the falsity of the declaration has become manifest."[95] Although the New York statute upon which the False Declaration Statute was modeled[96] expresses the prerequisites in the conjunctive, using the word "and," the False Declaration Statute expresses them in the disjunctive, using the word "or." In *Moore*, the defendant argued that his recantation was timely because, although disclosure of the falsehood had become manifest to him, the falsehood had not yet affected the proceeding.

The court refused to read the False Declaration Statute disjunctively, reasoning that to do so would frustrate Congressional intent. The court acknowledged the inconsistency between the deterrent and mitigation elements of the statute,[97] but reasoned that construing the recantation prerequisites in the disjunctive would weaken the deterrent effect of the statute and would disrupt the intended balance between these elements. This argument neatly begged the question by assuming what it set out to prove, i.e. exactly where Congress intended to place the balance point between deterrence and mitigation.

The court then speculated on the behavior that different constructions of the statute would induce in witnesses, reiterating a fear originally articulated in *United States v. Norris*[98] that the easy availability of a recantation defense would make perjury more attractive. The hypothetical witness would believe that perjury was risk free: if the lie was not discovered, he would not be prosecuted while if the lie was discovered, he could recant and would not be prosecuted. This reasoning led the *Norris* court to reject the retraction defense under the General Perjury Statute. The *Moore* court[99] likewise reasoned that the False Declaration Statute's deterrent effect would be nullified by giving perjurers the statutory right to recant after their lies were disclosed, but before the proceeding was substantially affected.

The court was here engaged in open warfare against the policy of the recantation provision. Citing *Norris* to explicate the recantation provision ignores the simple fact that the recantation provision was intended to change the law that *Norris* expounded. The *Moore* decision is more nearly an argument against the concept of a recantation defense than an attempt to construe it: the court simply rejects the statutory premise that recantation may induce more accurate testimony than inac-

94. 613 F.2d 1029 (1979).

95. 18 U.S.C. § 1623(d) (1982) (emphasis added).

96. *See infra* text accompanying note 44.

97. United States v. Moore, 613 F.2d at 1041.

98. 300 U.S. 564, 574 (1937).

99. *Moore*, 613 F.2d at 1041. This argument appears in *Scrimgeour*, 636 F.2d 1019 (5th Cir. 1981) and *Denison*, 663 F.2d 611 (5th Cir. 1981).

curate testimony.[100] The decision is, however, understandable because of the ambivalence toward recantation displayed in the statute itself.

In summary, the federal perjury statutes treat inconsistent testimony inconsistently, at times seizing on testimonial inconsistency as evidence of perjury and at others seeming to urge inconsistency that recognizes former testimony as false. What one might euphemistically describe as the resulting "tension" between the deterrence and mitigation policies of the statutes is, for federal witnesses and their counsel, an insoluble double bind.

III. Conflicting Incentives Created by the False Distinctions of the Statute

The probable effect of criminal and other instrumentalist statutes is usually analyzed by predicting the behavioral responses they are likely to engender, using assumptions about rationality and self-interest not unlike those used in economic analysis.[101] Thus, for example, the decisions in *Moore* and *Norris* rely on a typical, instrumentalist thought experiment: How would a rational, self-interested witness who was aware of the statute and its judicial construction take it into account in deciding whether or not to commit perjury? One should be exceptionally wary of such exercises when applied to perjury, for which no reliable data exist to test the accuracy of the assumptions or the conclusions. In default of empiricism, however, rhetoric remains the only instrument for critique of criminal laws.

This section will use this approach to analyze the incentives and disincentives relating to inconsistent testimony created by the federal perjury statutes for federal witnesses and federal trial attorneys. It will also analyze the strategic benefits that the inconsistent statement provision gives to federal prosecutors. It will attempt both to predict the actions that the statutory sanctions will lead to and to weigh the desirability of those actions against the goals of the statute.

A. *Effects of the Perjury Statutes on Federal Witnesses*

The inconsistent statement and recantation provisions will have effects on three categories of witness: those who contemplate committing perjury for the first time in a proceeding; those who have committed

100. The *Moore* court's reading means that the defendant's attempts to prove the two prerequisities to the recantation defense would often tend to be mutually exclusive. A lie that has not been exposed is more likely to have substantially affected the proceeding. Conversely, one major reason that a lie may not have substantially affected the proceeding is that it has become manifest. In most cases, therefore, one of the two prerequisites would probably fail, making the defense unavailable.

101. *See* Summers, *Pragmatic Instrumentalist in Twentieth Century American Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 Cornell L. Rev. 861 (1981); R. Posner, Economic Analysis Of Law, *supra* note 1; Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. Legal Stud. 259, 261 (June 1972) (seeking to quantify deterrence).

perjury and contemplate correcting it; and those who have made unintentionally false statements and contemplate correcting them.

Even if the witness is one whose behavior would be influenced by a perjury statute,[102] the inconsistent statement provision would have no deterrent effect on the decision to commit perjury in giving an initial testimonial account. It would, however, provide a strong disincentive to any witness whose original testimony was true and who is thinking of testifying falsely by contradicting that testimony. Even in the absence of the inconsistent statement provision, however, such a witness could be prosecuted under the False Declaration Statute for making the second statement. In such a prosecution, the original statement might be sufficient evidence of guilt. In addition, as discussed below in this subsection, by employing a number of well-known strategies, such witnesses can usually avoid repeating the original testimony in a different proceeding.

It is possible that a recantation provision could affect the initial decision to commit perjury, on the theory that recantation would be available if the lie failed. However, as seen above, such exposure disqualifies an attempted recantation, which makes the recantation provision of little importance to a witness contemplating perjury in giving an initial testimonial account of a matter.

For witnesses who have already testified inaccurately, the federal perjury statutes inhibit any change in testimony, regardless of the truthfulness of the change or its value to the tribunal. A summary of the provisions analyzed in the preceding section shows that a rational witness has no statutory incentive to correct prior testimony whether or not the prior testimony was intentionally false.

First consider the witness whose original testimony was innocently mistaken. Under the General Perjury Statute, although inconsistent testimony alone will not suffice for conviction, an attempt to correct earlier testimony may corroborate other evidence of the falsity of the earlier testimony and permit a prosecution that would have been otherwise unmaintainable. Because the *Norris* rule denies the witness the defense of recantation, a witness who corrects prior testimony faces Norris's fate.

For the same witness, under the False Declaration Statute, correction of prior testimony constitutes an inconsistent statement unless it is timely and in the correct form for a recantation. If it is held to be an

102. It is probable that a great deal of testimony is not actually affected by statutory sanctions. Several categories of potential perjurers will presumably commit perjury under any statutory regime. First, criminal defendants who perceive the benefit products risks of perjury to exceed its cost products will not be deterred. To the witness/defendant charged with a capital crime, if the the perjury is successful, it is rewarded, whereas if it fails, the incremental punishment is insignificant. Likewise, witnesses who are induced by intimidation to commit perjury will not be deterred if the threat of criminal sanctions is less certain or severe than the intimidator's threat. Witnesses who are confident that their lies will not be exposed, or that conclusive proof that they lied cannot be obtained, will not perceive the risk of conviction for perjury to be significant. Finally, of course, witnesses who do not reflect before committing perjury will not be affected by the statutory scheme in making the initial decision to lie.

inconsistent statement, the correction establishes a *prima facie* case of false declaration against the witness. The False Declaration Statute gives the innocently incorrect witness nothing to gain and everything to lose by correcting former testimony. Indeed, to the extent that the statute gives the innocent witness an incentive to testify in any particular way, it encourages the witness to testify consistently with former testimony even when that testimony was false.[103]

The hoped-for counter-effect of the False Declaration Statute's recantation provision has been frustrated by statutory limitations and severe judicial construction. The provision is as useless to witnesses whose original testimony was innocently mistaken as it is to those whose original testimony was intentionally false. A witness who truthfully states that his former testimony was innocently mistaken will not be held to have recanted.[104] The statute offers no opportunity for such a witness to correct the record without risk of prosecution.

As for the witness whose original testimony was perjurious, the recantation provision is of uncertain application because of the timeliness requirements. An attempt to recant that fails because of one of these requirements will destroy the witness's ability to defend against a charge of false declaration because the attempted recantation provides compelling evidence of both the falsity of prior testimony and the defendant's knowledge of the truth.[105]

But even a timely recantation is no bargain to the perjurer. Although recantation is a defense to a charge of false declaration, a witness remains susceptible to prosecution under the General Perjury Statute for making the recanted statement. No reported decision[106] has yet ruled on a defense that prosecution was barred under the General Perjury Statute by reason of a recantation under the False Declaration Statute, but language in several decisions suggests that such a prosecution is possible.[107] Thus, a witness may be prosecuted under the General Per-

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103. Although the federal statutes do not address the issue, decisions construing the General Perjury Statute have held that repetitions of a perjurious statement do not subject a witness to multiple counts of perjury. Thus, the risk of perjury is not increased appreciably by a witness's repetition of a prior incorrect statement while correction of it holds far more peril.

104. *See* discussion above at Part II-C-2.

105. Once rejected, the recantation issue may not be raised at trial and argued to the jury. The rule of [*United States v. Norris*] that recantation is no defense to perjury still holds sway when a defendant does not come within the recantation provisions of section 1623(d) and creates a bar to prosecution.

United States v. Denison, 663 F.2d at 618.

106. In United States v. Kahn, 472 F.2d 272, 283 (2d Cir. 1973), the court failed to reach this issue because it found the defendant, convicted under the General Perjury Statute, had failed to recant before the falsehood was exposed. However, it expressed discomfort with the idea that the government could prosecute under the General Perjury Statute if recantation successfully barred prosecution under the False Declaration Statute.

107. *Denison*, 663 F.2d at 616 n.6 (the recantation defense is available only to defendants charged under section 1623, not to those charged under section 1621.); United States v. Swainson, 548 F.2d 657, 663 (6th Cir. 1977), *cert. denied*, 431 U.S. 931 (dictum). In United States v. Mitchell, 397 F. Supp. 166 (D.D.C. 1974), *cert. denied*, 431 U.S. 933 (1977), defendants argued that the recantation provision was unconstitutional on grounds, among others, that the government could prosecute a recanting witness for perjury under 18

jury Statute for making a statement that he recanted.[108] It is likely that a recantation would corroborate falsity, in partial satisfaction of the two-witness rule, because of the rule that a recantation must unambiguously admit the falsity of the original statement and cannot attribute that inaccuracy to innocent error.[109] Thus, the perjured witness who is genuinely afraid of prosecution has absolutely no rational motive to recant.

The disincentives created by the federal perjury law's treatment of inconsistent testimony pose a threat to the process of cross-examination. The adversary trial examination, not prosecution for perjury, is the judicial system's chief institutional mechanism for assuring accurate testimony.[110] The adversary system relies primarily on the skill of the trial attorney in marshalling evidence and cross-examining witnesses in order to expose and neutralize inaccurate testimony, of both the intentional and unintentional variety.[111]

The inconsistent statement provision impedes the cross-examiner's ability to expose inaccurate testimony. Once a federal witness has given testimony, the federal statutes' command is not to tell the truth, the whole truth, and nothing but the truth. It is rather to tell the same thing, and nothing but the same thing, that the witness told before.[112] Cross-examination can grind to a halt when the risks associated with changes in testimony brook so large as to lead witnesses to assert their fifth amendment privilege against self-incrimination.[113]

U.S.C. § 1621. The court rejected this argument, holding that Congress could, consistent with due process, condition access to the protection of the recantation provision by requiring the defendant to increase his exposure to prosecution under the General Perjury Statute.

108. *See supra* note 107. The curious interplay between the General Perjury Statute and the recantation provision illustrates the effect of borrowing a statutory provision out of context. Both the New York Penal Code, the form on which the False Declaration Statute was modeled, and the Model Penal Code contain a recantation defense. In each case, recantation exonerates the witness from all criminal liability for the perjury. The False Declaration Statute, however, merely supplements the General Perjury Statute. The recantation defense thus has radically different implications in the federal scheme of law. Recantation under the False Declaration Statute exposes the witness to greater liability than exists under the General Perjury Statute.

109. Under the General Perjury Statute, admission that prior testimony was false can provide essential ammunition for the prosecution. The recantation may corroborate another witness's testimony as to falsity, thereby satisfying the two-witness rule. The recantation can also establish that the witness knew the truth at the time of the first statement, tending to prove that the original statement was intentionally false. Thus, the General Perjury Statute offers the strongest disincentives to correct inaccurate testimony.

110. *See* Best, *supra* note 13 (quote).

111. Wigmore celebrated cross-examination as:

> [T]he greatest legal engine ever invented for the discovery of truth . . . . If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure.

WIGMORE, EVIDENCE, *supra* note 13, at 1367.

112. Because of the "freezing effect," witnesses have been shown to become stubbornly committed to the first version of facts that they recount, even in the face of significant evidence to the contrary. E. LOFTUS & J. DOYLE, EYEWITNESS TESTIMONY 84-87 (1979). Thus, there is a bias against correcting previous testimonial accounts. *Cf.* State v. Saporen, 205 Minn. 358, 285 N.W. 898, 901 (1939). This bias is aggravated by threatening a witness who thinks of revising his testimony.

113. Witnesses often assert the fifth amendment privilege to avoid cross-examination

It is reasonable to assume that innocent error is considerably more common than perjury. The effect of discouraging correction in cases of innocent error would seem to exceed the marginal harm of any perjury inhibited by the inconsistent statement and recantation provisions as presently formulated. In addition, one must charge the inconsistent statement provision with the costs of perjury committed by witnesses who falsely affirm prior inaccurate testimony. For such witnesses, dishonest reaffirmation of the error keeps the testimony consistent and may be the less risky alternative.

B. *Effects on the Legal Profession*

The risks created by the federal perjury statutes create quandaries for lawyers advising federal witnesses. Both the American Bar Association Model Rules of Professional Responsibility (ABA Rules)[114] and the American Bar Association Code of Professional Responsibility (ABA Code)[115] require that an attorney who learns that false evidence has been presented to a tribunal must try to persuade the witness to correct the error and, failing that, must advise the court of the falsehood if the attorney can do so without revealing privileged matter.[116] Disclosure

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in criminal trials. *See* United States v. Frank, 520 F.2d 1287, 1292 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976) (striking the direct testimony of a government witness who invoked the fifth amendment when cross-examined by defendant's counsel). *Accord*, United States v. Nunez, 668 F.2d 1116, 1121 (10th Cir. 1981).

114. *Candor Toward the Tribunal.* (a) A lawyer shall not knowingly: . . . (2) fail to disclose a material fact to a tribunal when the disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; . . . (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures. (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by rule 1.6. [pertaining to client confidences].

MODEL RULES OF PROFESSIONAL CONDUCT 3.3 (1983). Comment 5 discusses the lawyer's duties when false evidence has been offered:

> When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If that persuasion is ineffective, the lawyer must take reasonable remedial measures.

See also Comments 4, 6, 11 and 12.

115. *Representing a Client within the Bounds of the Law*: (A) In his representation of a client, a lawyer shall not: . . . (4) Knowingly use perjured or false evidence . . . (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent . . . . (B) A lawyer who receives information clearly establishing that: (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication. (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-102(A)(4), 7-102(B)(1) & (2) (1981).

116. The Model Rules require the attorney to take "reasonable remedial measures" if the persuasion is not effective:

> If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal

may result in the witness, perhaps the attorney's client, being prosecuted for perjury or false declaration.[117]

In the context of federal perjury statutes, the warning requirement creates a particularly acute dilemma for the witness's counsel. The warning makes the imminent exposure of the falsehood to the tribunal manifest to the witness. This exposure arguably renders the witness's recantation, if he chooses to give it, ineffective.[118]

The ABA Rules and the ABA Code harmonize poorly with the federal perjury statutes. A witness who changes his testimony incurs serious risks, yet, attorneys are instructed to urge witnesses to take precisely those risks. The attorney who urges a witness to correct a falsehood does so because of his professional responsibility as an officer of the court, not out of concern for the interests of the witness.[119] The witness, who may have committed a crime, is urged to waive his constitutional privilege against self-incrimination and give what amounts to an in-court, sworn confession. It is disquieting to contemplate a court-

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will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

MODEL RULES OF PROFESSIONAL CONDUCT 3.3, Comment 11 (1983).

117. Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement . . . . Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 125 (1987). *Cf. Why Did Lee Testify in the Wang Case,* The Wall Street Journal, July 8, 1988 at 17, col.3 (recounting the story of an attorney who advised his client to recant, risking prosecution for the crimes about which the client had testified, in order to avoid perjury charges).

118. If an attorney's advice tainted the recantation, the statute would conflict with the policies of the rules regarding professional conduct. The warning given to the client would strip the client of a possible opportunity to avoid criminal liability. Yet, no obvious policy relevant to the False Decalaration Statute would distinguish an attorney's threat of disclosure from a threat made by others, such as the prosecutor or a third party. The statutory policy seems to emphasize the morality of the witness's decision to recant, permitting the defense if the recantation is stimulated by a guilty conscience but denying a defense if the recantation results from fear of exposure. Courts have emphasized this distinction in applying the statute. *See e.g.* United States v. D'Auria, 672 F.2d 1085 (1981).

119. The witness's interests would require that he be advised to seek independent counsel before taking the stand and establishing a *prima facie* case of false declaration or perjury against himself.

enforced rule of professional conduct that requires an attorney to advise a person to waive a fundamental constitutional right.

These conflicts are not inevitable, but flow in large part from the statutory scheme now in place, a scheme that jeopardizes any witness who risks rectification of testimonial errors. A rule that would remove the risk of recantation would reduce the occasions for such troublesome professional dilemmas.[120]

C. *Effects on the Prosecution of Organized Crime*

One might seek to justify the behavioral effects just described by arguing that the inconsistent statement provision has great utility to the government in criminal prosecutions. When Congress enacted the Federal False Declaration Statute[121] as part of the Organized Crime Control Act of 1970,[122] it heralded the statute as part of a new arsenal of weapons in the war against organized crime.[123] Witnesses are difficult to prosecute for perjury under the General Perjury Statute.[124] Elimination of the common law evidentiary restraints, including the inconsistent statement rule, was intended to make it easier for the government to obtain convictions for perjury, consequently deterring perjury and increasing convictions for the substantive offenses.[125]

But does the inconsistent statement provision really alter the balance of power between the prosecution and the criminal defendant? In light of the abandonment of the two-witness rule, the inconsistent statement provision would seem to be of value only in the relatively rare circumstance in which the government cannot decide which of a witness's contradictory statements to charge as false. The provision has, however, the potential for considerably more utility because it can be called into play when the government is unwilling, rather than unable, to designate the false statement. Consider the following scenario:

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120. These dilemmas are difficult enough if, as is implicit in the discussion, it is assumed that the lawyer "knows" that the witness testified falsely. As Justice Stevens noted: A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury . . . should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked. Nix v. Whiteside, 475 U.S. 157 (1986) (Stevens, J., concurring).

121. Pub. L. No. 94-550, 90 Stat. 2535 (codified as amended at 18 U.S.C. § 1623 (1982)).

122. The False Declaration Statute was enacted as Title IV of the 1970 Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 932 (codified as 18 U.S.C. § 1623 (1982)) and was amended in Pub. L. No. 94-550, 90 Stat. 2535.

123. "[W]e are going to try to make S.30 [The Organized Crime Control Act] the vehicle for the legislation that is directed primarily at organized crime and providing additional weapons with which to combat organized crime." *See Hearings, supra* note 29, at 107 (remarks of Sen. McClellan). "The purpose of the [Organized Crime Control Act] is to correct certain defects in our evidence gathering process."

124. *See Hearings, supra* note 29.

125. By facilitating perjury prosecutions, the False Declaration Statute was intended to enhance the reliability of testimony before the federal courts and grand juries and afford greater assurance that "testimony obtained in grand jury and court proceedings will aid the cause of truth." S. REP. No. 617, 59 (1969). *See* Dunn v. United States, 442 U.S. 100, 107-08 (1979).

Government calls Witness, who testifies at a grand jury proceeding. In response to the prosecutor's questions and in the absence of objections or cross-examination, Witness implicates Defendant in criminal activity.[126] At the trial of Defendant, however, Witness changes or recants his grand jury testimony. As a result, Defendant is acquitted. Government charges Witness with perjury.

Under the General Perjury Statute, Government must choose which of Witness's statements to charge as perjurious. This is sometimes a painful choice: If Government charges that the grand jury testimony was perjurious, Government would be contradicting the position it took at Defendant's trial, which would be institutionally embarrassing. If it charges that the trial testimony was perjurious, it faces proving the truth of Witness's grand jury testimony, something that it has just failed to prove in Defendant's trial. The problem under the General Perjury Statute is not so much that the Government does not know which version of Witness's story to challenge; it is rather that any specific challenge would be difficult to maintain.

The inconsistent statement provision of the False Declaration Statute resolves this dilemma. The statute does not require that, in order to prosecute under subsection (c), the government be ignorant of the truth, or have no corroborating evidence. The government can simply charge and prove that the witness made inconsistent statements, then sit back and watch him try to explain the discrepancy. With the sublime indifference of a logician exposing a contradiction, the prosecutor need take no embarrassing positions as to which of the witness's statements was really true.

By simplifying the prosecution of grand jury witnesses who change their testimony at subsequent trials, Congress hoped to strengthen the government's ability to hold wavering grand jury witnesses in line at the trials of grand jury target defendants.[127] The provision nails such witnesses to their grand jury testimony, testimony that was taken in the absence of confrontation and without objections or contemporaneous cross-examination by the defendant, testimony that might have been quite different if taken under the adversarial conditions of trial. The government can meet any substantive change in the witness's story with a charge of false declaration under the inconsistent statement provision. This threat diminishes the utility of the defendant's constitutional[128] right of cross-examination by preventing his counsel from obtaining concessions of error during the cross-examination of such witnesses at the defendant's trial.

Congress had these strategic effects of the statute in mind when it enacted the statute. Part of the statutory purpose was to prevent grand

126. It is assumed that the prosecution does not have reason to believe that the witness's grand jury testimony is perjurious. A conviction obtained by the government's knowing use of perjured testimony violates the fifth amendment due process clause. Giglio v. United States, 405 U.S. 150 (1972).

127. *See Hearings, supra* note 31.

128. Pointer v. Texas, 380 U.S. 400, 404 (1965).

jury witnesses from changing their testimony in response to underworld pressure.[129] Yet any statutory threat of sufficient magnitude to offset underworld threats of personal violence would seriously inhibit a witness who desired to change his grand jury testimony for less compelling reasons, e.g. that it was simply mistaken. And in civil litigation, where underworld threats are a rarity, the potent threat of the inconsistent statement provision is even more distortive.

Ironically, caselaw suggests that witnesses in criminal cases who want to change their grand jury testimony may be able to nullify the effect of the provision anyway. A well-advised grand jury witness who, because of intimidation or less venal motives, desires to testify differently at the defendant's trial has many alternatives. If he wishes to say nothing at the defendant's trial, he can simply invoke the fifth amendment when questioned at that trial. His basis for invoking the privilege would be his fear of a prosecution for perjury before the grand jury.[130] If the witness thus refuses to testify, the government cannot introduce the witness's grand jury testimony, which is hearsay.[131] Nor can it compel the witness to testify over his objection without granting him use immunity.[132]

After being granted use immunity at the trial, the witness can disclaim his grand jury testimony without running afoul of the inconsistent statement provision.[133] The government cannot use immunized trial testimony in prosecuting the witness for perjury at the grand jury,[134]

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129. *See Hearings, supra* note 31.

130. Although a witness may not claim the fifth amendment for fear that what he is about to say may be perjurious, United States v. Partin, 552 F.2d 621, 632 (5th Cir. 1977), *cert. denied*, 434 U.S. 903; United States v. Wilcox, 450 F.2d 1131, 1141 (5th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972) (dictum), he may invoke the privilege if he fears that the testimony he will give would subject him to liability for perjury in an earlier proceeding. *Wilcox*, 450 F.2d at 1141; Glickstein v. United States, 222 U.S. 139 (1911). The prior testimony does not waive the fifth amendment for this purpose. *Wilcox*, 450 F.2d at 1141. If the witness intends to testify inconsistently with prior testimony, the privilege would therefore be appropriate.

131. *See* FED. R. EVID. 801(d)(1) (limiting use of prior statements to those made by a declarant who testifies at the trial or hearing and is subject to cross-examination concerning the statement).

132. 18 U.S.C. § 6002 (1986).

133. The Federal Immunity Statute provides in part that if a witness is compelled to testify over his claim of a fifth amendment privilege, "no testimony or other information compelled under the order [compelling such testimony] (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, *except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.*" 18 U.S.C. § 6002 (1982) (emphasis added). False testimony of an immunized witness may be admitted in a prosecution for perjury in giving the testimony introduced as evidence of the *corpus delecti*. United States v. Wong, 431 U.S. 174 (1977); United States v. Mandujano, 425 U.S. 564, 584-85 (1976). An immunized witness's truthful testimony can be introduced in a perjury prosecution for false testimony given under the same grant of immunity and before the same tribunal. United States v. Apfelbaum, 445 U.S. 115, 128 (1980) ("[Immunized] testimony remains inadmissible in all prosecutions for offenses committed prior to the grant of immunity that would have permitted the witness to invoke his fifth amendment privilege absent the grant.") A witness, however, may not assert the fifth amendment privilege to avoid giving testimony that will be perjurious when given.

134. United States v. Doe, 819 F.2d 11 (1st Cir. 1987) (immunized grand jury testi-

nor can it charge the witness under the inconsistent statement provision.[135] The government must either charge that the trial testimony was a false declaration (and in the witness's trial for this charge, the government can use his grand jury testimony whether immunized or not)[136] or it can charge that the grand jury testimony was a false declaration and attempt to prove its case by other evidence. But in neither case is the inconsistent statement provision of any use.

A second strategy the reluctant witness can use is to affirm the grand jury testimony on direct examination, then to refuse to testify on cross-examination by defendant's counsel, claiming the privilege of the fifth amendment. If, as a result of the claim of privilege, the defendant is not permitted to cross-examine as to the substance of the testimony given on direct examination, the defendant is entitled to have the testimony stricken.[137] The witness, unless granted immunity, need not contradict his grand jury testimony using this technique. Nevertheless, the government loses the use of it.

Even if the witness does not invoke the fifth amendment or insist on immunity, the inconsistent statement provision does not prevent the effective disavowal of prior testimony through a claim of uncertainty or a loss of memory. The provision refers to statements that are so "inconsistent to the degree that one of them is necessarily false."[138] A witness who professes to a failure of memory between the grand jury proceeding and the trial has not satisfied this standard; memories can fail.[139] Faced with such a loss of memory, however, the government can introduce the witness's grand jury testimony at the defendant's trial.[140] And this technique is riskier for the witness, who can be prosecuted for perjury in

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mony cannot be used as evidence to prove charge of perjury in prior appearance); United States v. Cintolo, 818 F.2d 980, 988 n.5 (1st Cir. 1987), *cert. denied*, 108 S. Ct 259; United States v. Seltzer, 621 F. Supp. 714 (N.D. Ohio 1985), *aff'd*, 794 F.2d 1114 (6th Cir. 1986).

135. In re Grand Jury Porceedings, 644 F.2d 348 (5th Cir. 1981); United States v. Patrick, 542 F.2d 381, 384-86 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); United States v. Alter, 482 F.2d 1016, 1018 (9th Cir. 1973). *Cf.* United States v. Dunn, 442 U.S. 100 (1979) (approving prosecution under subsection (c) where the second inconsistent statement admitted the falsity of the immunized grand jury testimony).

136. United States v. Seltzer, 794 F.2d 1114 (6th Cir. 1986); United States v. Pisani, 590 F. Supp. 1326 (S.D.N.Y. 1984).

137. *See supra*, note 11. *Cf.* United States v. Pelusion, 725 F.2d 161, 169 (2d Cir. 1983) (it is not necessary to strike the direct testimony of a government witness who invokes the fifth amendment on cross-examination on a collateral matter not related to his direct testimony).

138. 18 U.S.C. § 1623(c) (1982).

139. United States v. Flowers, 813 F.2d 1320 (4th Cir. 1987) (reversing conviction under section 1623(c) where, although witness testified to different account in second proceeding, upon cross-examination he readily admitted that the differences in his testimony were due to a faulty memory and that his memory was better in the prior proceeding).

140. Under Federal Rule of Evidence 801, the government can introduce the text of the grand jury testimony of a witness who professes loss of recollection because the witness is deemed to be available for defendant to cross-examine. California v. Green, 399 U.S. 149 (1970); United States v. Russell, 712 F.2d 1256, 1258 (8th Cir. 1983). *See* United States *ex rel.* Thomas v. Cuyler, 548 F.2d 460, 463 (3d Cir. 1977) (distinguishing a witness who does not recall grand jury testimony at trial from one who pleads the fifth amendment — the latter's testimony may not be introduced).

denying memory. Again, however, the inconsistent statement provision provides no way of forcing the immunized witness to testify truthfully.

Viewed strictly as a weapon in the war on organized crime, the inconsistent statement provision would appear to offer the government minimal strategic gain to offset its potential for harm to other trial testimony.

These observations must, however, be qualified because of the way in which the current statutes are enforced. The behavioral effect of statutes is modified drastically by the exercise of prosecutorial discretion. Statutes that are enforced according to unstated standards of prosecutorial discretion no longer mean what they say, or even what courts say they say. Today's federal prosecutors do not seek indictments under the present statute against witnesses in civil cases who, on cross-examination, decide, well, yes maybe it was raining on the day of the accident after all.

An impressionistic survey of the reported cases suggests that the inconsistent statement provision is applied mainly to professional criminals. Strict enforcement of the inconsistent statement provision across the board would be too likely to ruin a good weapon in the war on organized crime. The indeterminacy introduced by the exercise of prosecutorial discretion thus makes both critique and justification of the rule difficult.

Nevertheless, written law should conform to law in practice as much as possible, if only to give the citizen and her attorney some idea of the risks that actually attend their options. To hide the illogic of the False Declaration Statute behind the benevolent judgment of the federal prosecutors weakens the rule of law. If the False Declaration Statute is to have a narrow scope, it should be amended to reflect that scope.

IV. A Proposal to Amend the False Declaration Statute

The twin problems of overbreadth—the tendency of the statute to reach innocent testimonial inconsistencies—and counterproductivity—the inhibition of desirable correction of both perjurious and non-perjurious testimony—both arise because the federal perjury statutes emphasize deterring initial perjury at the expense of encouraging mitigation of the effects of perjury through recantation. The root conflict between the deterrence and mitigation policies of the statutes has created an incoherent approach to testimonial inconsistency.

At a minimal cost in deterrence, the problems of overbreadth and counterproductivity could be ameliorated by a more uniform policy liberally permitting testimonial corrections. Statutory amendments that might accomplish this are described below:

1. Make the inconsistent statement provision of the False Declaration Statute inapplicable to statements made in the same proceeding.

Given the abolition of the two witness rule, which simplified the proof of false declaration, the additional or marginal value of the incon-

sistent statement provision is slight in comparison to its cost. It will usually be unnecessary to secure convictions because, unlike prosecutions under the General Perjury Statute, prosecutions under the False Declaration Statute can proceed on the basis of the witness's contradictory statement alone.

The inconsistent statement provision has little value when applied to inconsistencies in the same proceeding, given the countervailing value expressed in the recantation provision. The purely formal differences between inconsistent statements and recantations do not justify inhibiting or punishing testimonial corrections that are made without the necessary shibboleths.

2. Amend the Recantation Provision by (1) deleting both the "substantial effect" and "disclosure" requirements; (2) permitting a witness to designate as a recantation any statement that directly contradicted a former statement for which the defendant is charged for false declaration or perjury; (3) making recantation a defense to any charge under the General Perjury Statute; and (4) providing that recantation would be untimely if it does not occur in the same proceeding as the statement recanted or if it occurs after indictment for perjury in making the statement recanted.

These changes express a liberalized rule permitting mitigation of perjury before the end of the proceeding in which it was uttered. Under the proposed amendments, the existence of a recantation will not turn on the precise form of the testimony with which prior testimony is disavowed. A witness could designate what were formerly inconsistent statements within the same proceeding as a statement and its recantation, regardless of the form of the second of the two statements. As a result, a witness would be bound only by the last version of his testimony within a given proceeding. Most importantly, the amendment would permit witnesses to revise innocent testimonial errors without risking liability under the federal perjury laws.

The statute would offer the perjured witness a real incentive to recant because recantation would eliminate the risk of prosecution. The proposed amendments eliminate the uncertainty about whether the recantation timing prerequisites were satisfied, since the recantation would be timely if it occurred at any time before the proceeding ended and before the witness was indicted.[141] The Catch-22 liability to a charge under the General Perjury Statute would be eliminated.

This change would also reduce the conflict between an attorney's duties to disclose falsehood to a tribunal and her duties to clients or witnesses who may have testified untruthfully. Because a witness could change his testimony within the same proceeding without penalty, an attorney who believed that a witness had testified falsely could urge the

141. By permitting recantations until the end of the proceeding, the proposed amendment to the federal statute would avoid the problem raised by the Model Penal Code of defining the same occasion or "line of questioning" during which testimonial revisions are permitted.

witness to rectify the error on the record without, in effect, advising the witness to create the very evidence that could convict the witness of a crime. Even if the attorney were required to disclose the falsity to the tribunal, the witness would still have an opportunity to avoid liability by subsequent recantation prior to an indictment because recantation would no longer be barred by the disclosure of the falsehood to the tribunal.

A. *Evaluation of Proposed Changes*

The proposed amendments can be criticized for two reasons: they do not go far enough in eliminating the evils associated with perjury law's bias toward consistency and they go too far in reducing the deterrent effect of the present scheme. The proposed changes admittedly do not eliminate the evils associated with the elevation of consistency over truth where testimony is given in more than one proceeding. A grand jury witness can still be prosecuted for testifying differently at a subsequent trial. If a grand jury witness fails to recant a false declaration before the term of the grand jury expires, he cannot correct the error at a subsequent criminal trial and can be charged under the inconsistent statement provision. This inability might well prevent a witness from testifying truthfully at the trial or subsequent proceeding. However, the prospective gain from recantation is greatly reduced after the tribunal relies on the lie. In addition, permitting a witness to recant at any time after the end of the proceeding in which he lied would permit risk-free perjury.[142]

The proposed amendments do not prevent a witness who recants from being prosecuted for lying during his recantation,[143] nor do they prevent the government from using the first declaration in such a prosecution. In some cases, this risk could inhibit a desirable revision of erroneous testimony. Otherwise, however, the witness would be able to lie with impunity during recantation.

Many have voiced the fear that an unlimited right of recantation might encourage perjury by those who think it possible that their lies will be exposed, if at all, during the proceeding.[144] Such witnesses might be deterred under the original statute because exposure would

142. The interests at stake in the grand jury proceeding differ from those at stake in other contexts because of the effect on the non-witness's (the prospective criminal defendant's) right of confrontation. A possible solution, consistent with at least part of the congressional intention, would be to make the inconsistent statement provision applicable only to grand jury witnesses who had testified under a grant of immunity. This rule would give the government considerable control over such witnesses. A grant of immunity gives the criminal defendant against whom the witness testifies grounds for impeachment that partially offset the governments prosecutorial power over the witness.

143. It should be noted that prosecutors and courts are generally mistrustful for the witness who recants incriminating testimony. Frossard, *When the Accuser Recants: People v. Dotson*, 14 A.B.A. J. SEC. LITIG., No. 4, 11, 12 (1988). Yet, while experience may teach that such recantations are usually false, the inconsistent statement provision and the recantation provision do nothing to inhibit them in the same proceeding.

144. United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979).

instantly make recantation impossible. They would perceive the risk of prosecution as much smaller if they could recant after exposure of the falsehood.

This fear seems to be exaggerated. For one thing, the perjury is "risk free" only if the perjury is exposed during the proceeding and not afterward, when the possibility of recantation has passed. The perjurer who does not anticipate disclosure until after the proceeding is over will not be affected by the proposed statutory change because it will not affect his likelihood of being prosecuted. In addition, critics of liberalized recantation tend to ignore the effect of uncertainty on the potential perjurer's calculations. The uncertainty is most pronounced for witnesses contemplating perjury before a grand jury, where testimony is taken in secret. At the time when the witness must decide whether or not to lie, he must estimate the likelihood that he can learn of such secret testimony and recant before he is indicted by the grand jury. This requires estimating the combined chances that (1) his lie will be exposed, (2) the prosecutor and grand jury will believe the exposing testimony and (3) the witness will learn of the lie and be able to recant before an indictment for perjury against him is handed down or the jury's term ends. Perjury under such uncertainty of risk is not "risk free."

The uncertainty of risk is less for witnesses testifying at trial, but such witnesses must still evaluate the likelihood that the conflicting evidence will be believed and the likelihood that the witness can recant before being indicted for perjury. The witness must be concerned not with his credibility before tribunal in which the perjury is committed but with his credibility before a grand jury and another tribunal concerned with his perjury. The witness cannot know whether the perjury will ultimately "succeed" until after the end of the original proceeding. Again, such perjury is not "risk free."

Admittedly, and despite the uncertainty, it is likely that permitting recantation after exposure may increase perjury by some amount. Even so, it is plausible that the overall gain that the amendment would produce in accurate testimony would exceed the loss. The number of nonperjurious witnesses who have occasion to change their testimony is far greater than the number of potential perjurers whose decision to lie will be affected by the liberalized recantation provision. Untruth can have the same harmful effect on the judicial process whether it is innocent or intended. The potential harm of the present statutory scheme appears to outweigh its benefit by a large margin.

The proposed amendments would make the law of perjury more congruent with civil litigation practice as well. In the federal civil lawsuit, to which the False Declaration Statute also applies, witnesses are expressly permitted to change sworn testimony that they believe to be in error. A strict avoidance of inconsistent testimony would harden initial positions far more than is desirable.

The proposed amendments would rationalize the incentives offered federal court witnesses at little cost in prosecutorial enforcement. While

they would not solve all the problems associated with the attempt to compel honest behavior by threats of punishment, they offer the maximum encouragement to such behavior consistent with the punitive, instrumentalist regime of criminal law.

CONCLUSION

In enacting the False Declaration Statute, Congress gave little attention to the effect of the statute on the average federal witness. Its threats against inconsistent testimony are probably not what Congress wanted such witnesses to bear in mind during cross-examination. It is certainly doubtful that Congress intended to enact a rule that encourages all well-counseled witnesses in federal court to take the fifth amendment as soon as cross-examination begins. Whatever strategic advantage that the prosecution gains from such a rule is largely offset by common strategies that well-represented dishonest witnesses can employ.

The federal perjury statutes should incorporate a more accurate recognition of the realities of the trial experience. Consistency is not a testimonial virtue when it comes at the expense of truth. Inconsistency is often the mark of the honest mind grappling with the frailties of human memory. The law of perjury should not threaten such candor without better justification.

WATSON V. FT. WORTH BANK AND TRUST: THE CHANGING FACE OF DISPARATE IMPACT

LINDA L. HOLDEMAN*

I. INTRODUCTION.

Title VII of the Civil Rights Act of 1964[1] constitutes this country's first serious commitment to eradicating the enormous economic disadvantages caused by hundreds of years of racial and gender-related prejudice. In July 1989, Title VII will be 25 years old.[2] Its first 25 years have seen significant changes in the economic opportunities available to America's minorities and women. The most obvious forms of intentional discrimination are largely gone. In 1989 it is a rare employer who will admit racial or gender-related prejudice, even privately.[3] As a result, the percentages of mid-level jobs[4] held by minorities and women have greatly increased.[5] On Title VII's 25th Anniversary, there is much cause for celebration.

But there is also cause for concern. While members of once excluded groups have entered the mid-level workforce, most have not progressed to top-level positions.[6] Perhaps not surprisingly, the elimination of barriers to mid-level employment has spotlighted the unique barriers to equal employment in top-level jobs. Title VII's capacity to deal effectively with these barriers will be its major challenge for the next quarter-century. Its success will depend, in large part, on the vitality of the disparate impact proof model and its application to subjective employment criteria. This article will identify the battleground and ana-

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1. Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000e to -2000e-17 (1982)). Title VII prohibits both public and private sector employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) (1982). It not only creates and empowers the Equal Employment Opportunity Commission to enforce its requirements, 42 U.S.C. §§ 2000e-4 to -5 (1982), but it also creates a private right of action by victims of discrimination against employers who have violated Title VII's prohibitions. 42 U.S.C. § 2000e-5(f)(1) (1982). *See* Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355, 359-60 (1977); Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974).

2. The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e (1982), took effect on July 2, 1964.

3. *See generally* Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Postal Service Board of Governors v. Aikens*, 70 CALIF. L. REV. 1201, 1202-03 (1982).

4. Categories such as "mid-level" or "top-level" jobs defy definition. For purposes of this article, "top-level" jobs will refer to the top third of an employer's work force using salary, responsibility, visibility, and prestige as criteria. "Mid-level" jobs will refer to the middle third of the work force, using the same criteria.

5. *See generally* Blumrosen, *The Law Transmission System and the Southern Jurisprudence of Employment Discrimination*, 6 INDUS. REL. L. J. 313, 336-39 (1984).

6. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982).

lyze the United States Supreme Court's struggle to define an impact proof model applicable to subjective criteria.

II. History of Title VII Proof Models for Individual Cases

Title VII's tools for dealing with prohibited discrimination are its proof models. Although proof models theoretically are designed merely to facilitate the orderly consideration of relevant proof,[7] they have significant substantive impact. They define the levels of necessary proof, utilize rebuttable presumptions, and explicitly interpret the substance of the statute.

In the early years of Title VII litigation, the courts developed two principal proof models[8] for establishing an individual Title VII cause of action: the disparate treatment model, and the disparate impact model.[9]

A. *Disparate Treatment Model*

The individual disparate treatment case is commonly considered the classic discrimination case.[10] Under this theory, the plaintiff proves that the employer has intentionally treated an employee less favorably based upon a protected characteristic such as race or sex.[11] The proof model for an individual disparate treatment case proceeds in 3 stages: (1) the plaintiff's *prima facie* case, (2) the defendant's claim of legitimate business reason, and (3) the plaintiff's proof that the defendant's "legitimate reason" was a mere pretext.

The first stage, the plaintiff's *prima facie* case, is so simple that it is often treated by stipulation. For instance, in a case alleging discriminatory hiring, the plaintiff need only prove:

> (i) that he belongs to a [protected group]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[12]

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7. International Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

8. The theory of perpetuation of the effects of past discrimination is not discussed in this paper in light of its demise in *Teamsters*, *id.*. The proof model for failure to reasonably accommodate religious practices is also omitted as it has limited practical relevance to the issues discussed in this article.

9. In any given case, a plaintiff may proceed under both theories concurrently. *See, e.g.*, Wright v. National Archives and Records Serv., 609 F.2d 702, 710-11 (4th Cir. 1979) (en banc).

10. The Supreme Court first applied the disparate impact theory in Griggs v. Duke Power Co., 401 U.S. 424 (1971), two years before setting out the individual disparate treatment model in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

11. Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

Teamsters, 431 U.S. at 335-36 n.15 (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 129 U.S. 252, 265-66 (1977)).

12. *McDonnell Douglas*, 411 U.S. at 802. *McDonnell Douglas* articulates the model in a

The *prima facie* case raises an inference of discrimination by ruling out the most common reasons for rejecting an applicant.[13] In the second stage of proof, in order to rebut this inference, the defendant need only articulate some legitimate, nondiscriminatory reason for plaintiff's rejection.[14] This is a burden of production only. The employer need only *present* some evidence of a legitimate reason; he need not *convince* the trier of fact that it was the real reason for the employment decision.[15] Thus, just as the plaintiff's *prima facie* task is relatively easy, the defendant's stage two task is also relatively easy.

The heart of the individual disparate treatment case—where most such cases are won or lost—is stage three. The plaintiff must prove, by a preponderance of the evidence, that the employer's articulated "legitimate reason" was a "mere pretext" for discrimination.[16] In other words, the plaintiff must prove that the defendant's true motive was based upon the plaintiff's membership in a protected group. Because of the subjective nature of intent, the increasing Title VII sophistication of employers, and the defendant's exclusive knowledge of its own motives, the plaintiff's burden at this stage of the disparate treatment case is quite difficult.

B. *Disparate Impact Model*

While the individual disparate treatment model can be effective in proving discrimination against a relatively unsophisticated employer whose articulated motives are both illicit and transparent, it does little to address the more subtle and invidious discrimination which results from "artificial, arbitrary, and unnecessary barriers"[17] to full employment. These barriers are facially neutral but discriminatory in effect. Title VII is, of course, intended to eliminate *all* unnecessary barriers to full employment.[18]

In order to address such facially neutral employment practices, the courts have applied the same sort of "disproportionate impact" analysis which had previously been applied to Fourteenth Amendment cases.[19] The Supreme Court first applied disparate impact analysis in a Title VII claim in the 1971 case of *Griggs v. Duke Power Co.*,[20] and more fully set out the elements of the proof model in *Albemarle Paper Co. v. Moody*.[21]

Like the disparate treatment model, the disparate impact case pro-

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hiring case. Comparable standards apply in promotion, firing, and conditions of employment cases.

13. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); *Teamsters*, 431 U.S. at 324.
14. *McDonnell Douglas*, 411 U.S. at 802.
15. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).
16. *McDonnell Douglas*, 411 U.S. at 807.
17. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
18. *Id.* at 431.
19. *See* Lau v. Nichols, 414 U.S. 563 (1974); Perkins v. Matthews, 400 U.S. 379 (1971); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977).
20. 401 U.S. 424 (1971).
21. 422 U.S. 405 (1975).

ceeds in three stages; however, the first stage of an impact case is much more burdensome than its counterpart in a disparate treatment *prima facie* case. The plaintiff must demonstrate that a particular employment device has an adverse impact on a protected group in marked disproportion[22] to its impact on employees outside that group.[23] This *prima facie* case is almost entirely statistical. It often requires voluminous discovery, thorough and detailed analysis of the employer's total organization and operation, and expert testimony by statisticians, industrial psychologists, and personnel managers. The statistical comparisons must be valid in terms of significance (based on a sample large enough to yield reliable results),[24] scope (covering an appropriate category of employees),[25] and time (covering an appropriate length of time).[26]

Under the *Griggs/Albemarle* proof model, once a plaintiff has established a *prima facie* case of disparate impact, the burden of persuasion (not merely the burden of production) shifts to the defendant to establish the business necessity[27] of the questioned employment practice.[28] Like the plaintiff's initial task, this is usually a difficult undertaking. The employer must show that the employment device is manifestly job related or necessary to his valid business purpose, despite its disparate effect upon protected groups. The business necessity standard is usually considered a higher standard than the corresponding standard (the articulation of a legitimate non-discriminatory reason) in an individual disparate treatment case.[29]

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22. The Uniform Guidelines on Employee Selection Procedures have established a suggested benchmark of eighty percent. A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) of the rate for the group with the highest rate will generally be regarded by the federal enforcement agencies as evidence of adverse impact. 29 C.F.R. § 1607.4 (1986). While the "80% rule" is not a precise formula for determining adverse impact, it is a benchmark of prosecutorial discretion, Clady v. County of Los Angeles, 770 F.2d 1421 (9th Cir. 1985), and as part of the uniform guidelines, is entitled to great deference by courts. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

23. *Griggs*, 401 U.S. at 424.

24. *See, e.g.*, Kim v. Commandant, Defense Language Institute, 772 F.2d 521 (9th Cir. 1985); Soria v. Ozinga Bros., 704 F.2d 990 (7th Cir. 1983); Harper v. Trans World Airlines, Inc., 525 F.2d 409 (8th Cir. 1975).

25. *See, e.g.*, Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 482 (9th Cir. 1983); Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975).

26. *See, e.g.*, Capaci v. Katz & Besthoff, 711 F.2d 647 (5th Cir. 1983); Roman v. ESB, Inc., 550 F.2d 1343 (4th Cir. 1976); Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.4, 1607.15 A(2) (1986).

27. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *Griggs*, 401 U.S. at 432. *But see* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1328-29 (2d ed. 1983) [hereinafter SCHLEI & GROSSMAN].

28. Of course, the defendant may also dispute the plaintiff's statistical analysis on the impact issue. But the burden of persuasion on the impact issue does not shift, it remains with the plaintiff.

29. The Supreme Court has neither precisely defined "business necessity" nor compared it to "legitimate business reason." Most authorities, while recognizing the uncertainty, view "business necessity" as a higher standard. L. MODJESKA, EMPLOYMENT DISCRIMINATION LAW 49-53 (2d. ed. 1988); SCHLEI & GROSSMAN, *supra* note 27, at 1328-30; Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C.L. REV. 419 (1982); Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1298 (1987).

Once the defendant has established the necessity of the employment device, the plaintiff, in the third and final stage, must prove that there are other reasonable alternatives which would have less adverse impact.[30] This proof may take the form of evidence showing that there are reasonable alternatives to the particular skill or characteristic required, but more often the plaintiff will seek to prove that there are reasonable alternatives to the criteria used to measure the required skill. The difficulty of this proof stage will depend largely on the facts of each particular case and such factors as how much less discriminatory the alternative practice must be, how much and what kind of evidence will establish the impact level of the alternative practice, and how adequately the alternative practice must address the employer's needs.[31]

C. *Equal Employment in Top-level Jobs: Importance of Disparate Impact and Subjective Criteria*

Despite progress in equal opportunity for mid-level jobs, minorities and women will remain second class members of the workforce until equal opportunity is a reality in top-level jobs. But equal opportunity encounters unique barriers at top employment levels. Some of these barriers may not be directly related to *current* employment discrimination.[32] However, few would dispute that racial and gender-related discrimination is alive and well at the upper echelons of employment. And few would dispute that the higher the job level, the more subjective are the criteria for measuring potential for success. Therefore, it is evident that Title VII's treatment of subjective criteria will be crucial to the achievement of equal opportunity in top-level jobs.[33]

Further, a number of factors combine to make the disparate impact proof model the primary focus of the subjective criteria issue. First, the more subjective the criteria, the more difficult it is to prove intent. This is true not only from a purely evidentiary standpoint, but also because "intent" is often difficult to define,[34] particularly in the context of subjective criteria for top-level jobs.[35] The murky issues of intent will be

30. *Griggs*, 401 U.S. at 424.

31. In the pre-*Watson* cases, these issues are not resolved; nor does *Watson* shed much light in these areas. *See infra* section III (7).

32. For instance, successful applicants for top-level jobs usually need some combination of mid-level experience and/or particular skills and education. Regrettably, minorities and women are still not equally represented in this applicant pool. Undoubtedly the causes of this underrepresentation are varied and include time lag between increasing mid-level employment and readiness for promotion, economic and cultural vestiges of past discrimination, and personal lifestyle choices such as fulltime parenthood.

33. For the classic analysis of the relationship between disparate impact, subjective criteria, and top-level jobs, see Bartholet, *supra* note 6.

34. *See generally* Bartholet, *supra* notes 3 & 6; Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 733 (1987).

35. For example, a university seeking to hire a dean would intentionally discriminate by not hiring a black applicant because he is black. But does the university *intentionally* discriminate on the basis of race by not hiring the black applicant because the search committee does not believe that the applicant possesses the cultural attributes which would enable him to persuade potential donors to contribute scholarship funds to the university?

affected by the importance of the employment position in question. The more crucial the job, the more fact finders will tend to give employers the benefit of the doubt on the question of intent. Thus, the disparate treatment model is less useful for analysis of subjective decision-making.

In addition, the recent limitations on the availability of class actions[36] have significantly reduced the viability of the pattern and practice suit;[37] and this is particularly true for top-level jobs which, by their nature are more distinctive and therefore less susceptible to class treatment. Finally, recent years have seen a significant de-emphasis on affirmative action as a concept, and a clear rejection of quotas as a "quick fix" for thorny Title VII problems.[38] The most appropriate remaining analytical approach, then, is disparate impact analysis.

Thus, the dissection and evaluation of subjective decision-making, especially in the context of the disparate impact proof model, will be a key component of Title VII's next frontier—equal opportunity for top-level jobs. The 1988 decision of *Watson v. Ft. Worth Bank and Trust*[39] was only the first step down a long and difficult road. As the next section will explain, much remains undecided.

III. *WATSON V. FT. WORTH BANK AND TRUST*

A. *Pre-Watson Uncertainties*

Though the Supreme Court had never expressly limited disparate impact's application, the Court had never applied impact analysis to subjective decision-making. Prior Supreme Court disparate impact cases had dealt with objective devices such as the requirement of a high school diploma or an intelligence test,[40] a height-weight requirement,[41] or a written examination.[42] However, as plaintiffs searched for more effective ways to prove system wide discrimination, they sought to apply the disparate impact proof model to subjective employment practices such

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While it is certainly possible to analyze this issue in terms of intent, it is much more appropriately analyzed as a question of adverse impact and legitimate need for the criteria.

36. *See* General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147 (1982); East Texas Motor Freight Sys., Inc. v. Rodriquez, 431 U.S. 395 (1977); Redditt v. Mississippi Extended Care Centers, Inc., 718 F.2d 1381 (5th Cir. 1983); Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 MICH. L. REV. 524 (1987).

37. The "pattern and practice suit" is the proof model for a Title VII disparate treatment class action. In a pattern and practice suit, the plaintiff must first show that disparate treatment is the defendant's standard operating procedure. Teamsters v. United States, 431 U.S. 324, 336 (1977). The defendant may then rebut the inference of discrimination created by the plaintiff's statistics by attacking the plaintiff's statistics themselves, by attacking the plaintiff's analysis of those statistics, or by offering an alternative statistical analysis. *Id.* at 339-40.

38. *See* Watson v. Ft. Worth Bank & Trust, 108 S. Ct. 2777 (1988); Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). *Cf.* Connecticut v. Teal, 457 U.S. 440 (1982).

39. 108 S. Ct. 2777 (1988).

40. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

41. Dothard v. Rawlinson, 433 U.S. 321 (1977).

42. Connecticut v. Teal, 457 U.S. 440 (1982).

as subjective evaluation systems or hiring or promotion interviews.[43] Defendants argued that disparate impact analysis was inappropriate in the context of a subjective system for a variety of reasons,[44] and soon the circuit courts were widely split, some even vacillating internally.[45] The District of Columbia Circuit and the First, Second, Third, Sixth, Seventh and Eleventh circuits concluded that application of disparate impact analysis to subjective criteria is appropriate.[46] The Fourth, Fifth, Eighth, Ninth and Tenth circuits held that disparate impact analysis does not apply to employment decisions based on subjective criteria;[47] yet, each of these five circuits has applied impact analysis to subjective decisions in other cases.[48] The Supreme Court undertook to resolve the issue of whether disparate impact could be applied to subjective employment decisions when it granted certiorari in *Watson v. Fort Worth Bank*

43. *Infra* note 46.

44. *Infra* notes 46-47.

45. *Infra* notes 46-47.

46. Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) (promotion practice with subjective standards subject to disparate evaluations); Robinson v. Polaroid Corp., 732 F.2d 1010 (1st Cir. 1984) (layoff selection guidelines, including subjective evaluations of employees' knowledge, past performance, and future potential, evaluated for disparate impact); Zahorik v. Cornell Univ., 729 F.2d 85 (2d Cir. 1984) (tenure decision involving subjective peer evaluations upheld under disparate impact analysis); Coser v. Moore, 739 F.2d 746 (2d Cir. 1984) (prior experience requirements held to be job related, justifying disparate impact on women professors and classified staff); Wilmore v. City of Wilmington, 699 F.2d 667 (3rd Cir. 1983) (fire department promotions system, incorporating subjective evaluations, found to be disparate impact on racial minorities); Rowe v. Cleveland Pneumatic Co., Numerical Control Inc., 690 F.2d 88 (6th Cir. 1982) (rehire system giving plant foremen unrestricted discretion not sufficiently job related to justify adverse impact); United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977) (subjective requirements including good character, moral conduct and lack of dissolute habits held to violate Title VII due to disparate impact on blacks), *cert. denied*, 434 U.S. 875 (1977); Green v. United States Steel Corp., 570 F. Supp. 254 (E.D. Pa. 1983) (extended *Wilmore*, holding that an unguided subjective hiring process, depending on interviewer's "gut-level reaction" to individual applicants, requires a more specific explanation to rebut *prima facie* showing of disparate impact than the defendant's stated reason that he was seeking the best qualified people).

47. Pope v. City of Hickory, 679 F.2d 20, 22 (4th Cir. 1982) (disparate impact model only applies to specific procedures, usually a criterion for hiring); Mortensen v. Callaway, 672 F.2d 822, 823-24 (10th Cir. 1982) (subjective system where numerous factors were combined to evaluate chemists for supervisory positions did not constitute neutral employment practice amenable to disparate impact analysis); Harris v. Ford Motor Co., 651 F.2d 609, 611 (8th Cir. 1981) (subjective decision-making system, such as supervisory evaluation of work quality, not the type of practice that can form the foundation of disparate impact case); Heagney v. University of Wash., 642 F.2d 1157, 1163 (9th Cir. 1981) (disparate treatment model appropriate where gist of plaintiff's claim is use of subjective or ill-defined criteria).

48. Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985) (United States Post Office promotion system, based on subjective prior "detailing" to upgraded jobs, subject to disparate impact analysis); Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983) (promotion system including oral interview and subjective performance appraisal invalidated due to disparate impact), *cert. denied*, 466 U.S. 972 (1984); Hung Ping Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982) (predominately subjective promotion selection system should be evaluated under disparate impact theory); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971) (seniority system limiting promotion to employees with experience in certain, typically all-white departments, violated Title VII under disparate impact model), *cert. dismissed*, 404 U.S. 1006 (1971). Even the Fifth Circuit has approved the use of disparate impact for a subjective selection system. Page v. United States Indus. Inc., 726 F.2d 1038, 1046 (5th Cir. 1984).

and Trust.[49]

B. *Watson's History*

In 1973, Clara Watson was hired by Fort Worth Bank and Trust (the "bank") as a proof operator. During the next seven years Watson was promoted several times and by January 1980, she held the position of commercial teller.[50] During 1980 Watson applied, and was rejected, for four promotions. On each occasion Watson's objective qualifications were similar to those of the successful white applicants.[51]

The bank employed some eighty people in the Ft. Worth area. In 1973, when Watson was hired, there were only four other black employees. Two printed checks in the basement, one was a kitchen worker, and the other was a porter. The bank had never had a black supervisor, let alone a director or officer. Statistics showing hiring, salary, promotion rates, and evaluation results showed marked disparities between blacks and whites.[52]

Regarding the positions sought by Watson in 1980, the bank had no objective procedure for evaluating applicants, nor had there been any attempt to identify the training, experience, and skills required for any of the four positions. Each hiring decision was made by the manager who would supervise the open position. After an interview, the manager would simply make an intuitive decision from among the applicants, by considering whatever subjective criteria that manager believed to be relevant.[53]

After her fourth rejection, Watson exhausted her administrative remedies and filed suit. She alleged that the bank had discriminated against her and against similarly situated persons on the basis of race, in contravention of Title VII.[54]

The trial court initially certified the class under Federal Rule 23, but decertified the class after trial because of lack of commonality and numerosity. On the merits of Watson's individual claims, the trial court refused to apply the disparate impact proof model to the subjective system. Using the individual disparate treatment model, the trial court found that Watson had established a *prima facie* claim of discrimination, but had failed to establish pretext.[55]

Watson appealed to the Fifth Circuit, arguing that the disparate impact model should have been applied to her claims. Adhering to its recent precedent of *Pouncy v. Prudential Insurance Co.*[56] and its progeny, the Fifth Circuit affirmed the trial court's ruling on the disparate impact is-

49. 108 S. Ct. 2777 (1988).
50. Watson v. Fort Worth Bank & Trust, 798 F.2d 791 (5th Cir. 1986).
51. *Id.*
52. *Id.* at 808.
53. 108 S. Ct. at 2782.
54. *Id.*
55. *Id.* at 2783.
56. 668 F.2d 795 (5th Cir. 1982).

sue.[57] The Supreme Court granted certiorari on the disparate impact issue alone,[58] and on June 29, 1988 the Court handed down a decision which extended the disparate impact model to subjective practices. The decision, however, left considerable doubt as to what disparate impact now means.

C. *The Watson Opinion*

1. Overview of Opinion

Watson was heard by only eight Justices, but it produced three opinions. They concur only insofar as they reaffirm the disparate impact model and uphold its application to subjective criteria cases.

The plurality opinion, written by Justice O'Connor, did not expressly overturn any part of *Griggs* or other previously controlling disparate impact authorities. On the contrary, Justice O'Connor opined that "[o]ur previous decisions offer guidance . . . ."[59] She did not characterize her articulation as a modification even to adapt the old standards to a new context, but rather as "a fresh and somewhat closer examination of the constraints that operate to keep [disparate impact] analysis within its proper bounds."[60] Justice O'Connor's use of the present tense suggests that she considered the constraints she was articulating to be already in place, and that she considered her opinion to be an examination rather than an expansion of them. She also stated that the point of this articulation was "to explain in some detail why the evidentiary standards that apply in these cases should serve as adequate safeguards against the danger that Congress recognized."[61] The express intent of the opinion was not to impose new standards, but to demonstrate why the old standards are adequate to protect the legitimate interests of employers, without forcing them to use quotas or preferential treatment. The problem is that the language Justice O'Connor employed to articulate the evidentiary burdens of the parties sometimes varied from the terminology previously used in the impact precedents and can be read as an attempt to redefine the proof model. This redefinition came over the objection of the three Justice concurrence, and over Justice Stevens' opinion that the elements of the proof model were not at issue in the case.[62] The core problem of the case is how to resolve these contradictions in a reasoned and judicially sound manner. The ultimate fate of the new definition, if indeed the plurality opinion is a new definition, must await the next disparate impact case to be heard by a full Court.[63]

57. Watson v. Fort Worth Bank & Trust, 798 F.2d 791 (5th Cir. 1986).
58. 107 S. Ct. 3227 (1987).
59. 108 S. Ct. at 2788.
60. *Id.*
61. *Id.*
62. Justice Stevens' opinion thus calls into question the precedential value of the plurality's new standards since they may be considered dicta. There is further question as to the precedential value of a plurality opinion.
63. For some of the issues raised by *Watson*, the wait may not be long. On June 30, 1988, the Supreme Court granted certiorari in Atonio v. Ward's Cove Packing Co., 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988) In *Atonio*, the Court will

Though the Court was sympathetic to the Bank's argument that the application of disparate impact analysis might force employers using subjective criteria to secretly utilize quotas in order to insure against disparate impact, all eight Justices agreed that application of disparate impact analysis to subjective decision-making was essential to the vitality of Title VII.[64] Justice O'Connor observed that to hold otherwise would largely nullify the disparate impact proof model even where objective criteria were used. She wrote, "[s]o long as an employer refrained from making standardized criteria absolutely determinative, it would remain free to give such tests almost as much weight as it chose without risking a disparate impact challenge."[65] The Court implicitly recognized that society's interests in rational and fair economic decision-making, and in equal employment opportunity would be undermined by a Title VII policy which tended to shield subjective employment practices from liability exposure, while subjecting genuinely objective practices to close legal scrutiny. Justice O'Connor further noted that there is no analytical impediment to the application of impact analysis to subjective criteria, since both objective and subjective criteria constitute "a facially neutral practice, adopted without discriminatory intent, [but which] may have effects that are indistinguishable from intentionally discriminatory practices."[66] Both from the standpoints of sound policy and conceptual coherence, subjective criteria cases must be subject to disparate impact analysis.

The four-Justice plurality recognized an employer's need for the flexibility of subjective decision-making, even in the face of a statistically disparate impact on a protected class, where the subjective practice has a rational and legitimate basis. The plurality was also concerned that defense of a disparate impact claim challenging a subjective employment device would be unduly expensive and difficult, and that the extension

consider (1) the probative effect of statistical evidence regarding jobs not at issue, (2) the placement of the burden of proof, and (3) the application of disparate impact analysis to a system wide challenge of an employer's personnel practices.

64. 108 S. Ct. 2786-87.

65. *Id.* at 2786.

66. *Id.* The conceptual framework of the application of disparate impact to subjective decision-making has been the subject of much commentary. *See, e.g.*, D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION 22-26 (Supp. 1984); SCHLEI & GROSSMAN, *supra* note 27, at 191-205, 1288; Bartholet, *supra* note 6; Cooper, *Title VII in the Academy: Barriers to Equality for Faculty Women*, 16 U.C. DAVIS L. REV. 975, 991-95 (1983); Maltz, *Title VII and Upper Level Employment—A Response to Professor Bartholet*, 77 NW. U.L. REV. 776 (1983); Stacy, *Subjective Criteria in Employment Decisions Under Title VII*, 10 GA. L. REV. 737 (1976); Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45 (1979); Comment, *Subjective Employment Criteria and the Future of Title VII in Professional Jobs*, 54 U. DET. J. URB. L. 165 (1976); Note, *Title VII and Employment Discrimination in "Upper Level" Jobs*, 73 COLUM. L. REV. 1614 (1973). Nor is Justice O'Connor's conclusion completely self-evident. There are fundamental differences between a subjective selection device and an objective device, particularly for purposes of disparate impact analysis. The disparate impact model analyzes the specific selection device for discriminatory effect. In the context of an objective device, this sort of analysis is conceptually simple, because the device is the same whether applied by a single supervisor or by a number of supervisors. Not so with a subjective device. As a matter of fact, one could say that a subjective device applied by five different supervisors is actually five different selection devices, despite the fact that they are all described by the same words.

of disparate impact analysis to subjective decision-making would result in the use of "surreptitious quota systems"[67] in order to insure impact-free statistics.[68] To extend the disparate impact proof model to subjective practices without forcing employers to use quotas, the plurality "re-examined" the proof model in some depth. Whether the plurality appreciably weakened the model is not a question subject to simple resolution. It is necessary to look closely at each element of the "re-examined" proof model. It appears that some change in the model was intended. Some changes may prove more cosmetic than substantive, and some changes await clarification. The effect of most will depend on case-by-case implementation by trial courts.

The O'Connor opinion first addressed the plaintiff's *prima facie* case. The plurality expressly required the plaintiff to identify the employment practice which is alleged to be discriminatory, and emphasized that the plaintiff must prove the causal link between the challenged practice and the disparate impact. Second, the plurality re-articulated the employer's response necessary to counter such a *prima facie* case. The traditional "business necessity" test was, however, clouded by language suggesting that the employer need only show that the challenged practice is justified by "legitimate business reasons." The plurality expressly held that the use of the challenged employment practice need not be defended with formal validation studies. Moreover, the defendant's burden on those elements may have been reduced to a mere burden of production and not of persuasion. Finally, the plurality opinion offered no guidance as to just what a plaintiff must show in order to establish that an employer's legitimate interests would be adequately served by an alternative, non-discriminatory practice.

Justice Blackmun's opinion, in which Justices Brennan and Marshall joined, squarely rejected the new articulation of the impact proof model. They adhered to the precedent of *Griggs*[69] and *Albemarle*[70] as the definitive statements of the elements of a disparate impact case. This concurring opinion particularly stressed that the defendant's rebuttal burden is one of persuasion rather than production of evidence, and criticized any attempt by the plurality to relax the standards for validation of subjective criteria.

Justice Stevens also declined to endorse the plurality's new articula-

67. 108 S. Ct. at 2787.

68. The possibility that a more stringent disparate impact proof model will significantly reduce the surreptitious use of quotas is questionable. While tougher proof standards will increase the difficulty of a disparate impact plaintiff's case, it is far from obvious that new standards will significantly reduce the number of claims brought. Faced with the necessity to defend, few employers would significantly weaken their defense efforts based upon the assessment that their ultimate odds of success are better. This is particularly true since the new standards themselves are subjective and few employers will be certain enough of the outcome at trial to risk the high consequences of losing an impact case. It will still be less expensive and more effective to insure that the prima facie statistical case can not be made.

69. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

70. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

tion of the proof model. He argued that discussion of "evidentiary standards" should await another day when those issues are before the Court. Essentially, this concurring opinion is significant in two respects. First, it deprived the O'Connor opinion of majority status. Second, it underlined the fact that the plurality opinion may be viewed as dicta to the extent that it rearticulated, if not redefined, the elements of the proof model.[71]

2. The Identification Requirement

The plurality noted that the plaintiff must identify the objectionable employment practice as an element of the *prima facie* case.[72] While this element may not have been so clearly articulated in *Griggs*,[73] and *Albemarle*[74] the requirement of identification of an objectionable employment practice was, at least implicitly, an element of a disparate impact case before *Watson*.[75] However, it is not entirely clear how specific the *Watson* plurality requires the plaintiff to be, and the degree of specificity is crucial at the point of proving the causal link between the practice and the disparate impact.[76]

It is here that we must be most precise in defining and using terminology. Assume a multi-component hiring procedure which combines: (1) a degree requirement, (2) a check of references, and (3) an interview. The interviews are conducted by a single decision-maker who subjectively measures the applicant using a list of criteria such as ability to communicate, leadership, ability to relate well with others, professional appearance, and attitude. There is a system for recording the interviewer's subjective assessments by ranking on a scale of one to six. A formula assigning relative weight for each component then guides the final decision. The decision is still substantially the result of subjective judgments, but the decision-making process is fairly well documented.

In such a case, the *Watson* plurality would certainly require a plaintiff to do more than show that overall hiring statistics are disparate. The plaintiff would be able to, and therefore would be expected to, for example, assess whether the degree requirement itself had an adverse impact,

71. *See also supra* note 58.

72. 108 S. Ct. at 2788.

73. *Griggs*, 401 U.S. at 424.

74. *Albemarle*, 422 U.S. at 405.

75. All prior cases in which the Supreme Court applied disparate impact analysis have focused on specific components of a selection device. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440 (1982) (written examination as a screening device for promotion); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (exclusion of methadone users); Dothard v. Rawlinson, 433 U.S. 321 (1977); *Albemarle*, 422 U.S. at 405 (a pre-employment test).

76. The Court requires only identification of the "practice," and does not specify that the criterion must be isolated. The Court supported the identification requirement on the authority of *Teal*, which involved a two-step selection process. In that case, the first screening had an adverse impact, but the second step compensated for the adverse impact. The Court applied impact analysis separately to the first step. So in such a system, it is clearly important to focus on a rationally separate and discrete step in the total process. Beyond that, the *Watson* opinion does not say how specific the identification must be.

since that impact is amenable to objective measurement.[77] The plaintiff would be able to identify, and therefore would be expected to identify, which of the three components adversely impacted a protected group, since the final formula assigning numerical values and weights to each component would allow that impact to be tracked. The plaintiff could theoretically even assess the impact of each subjective criterion, if the subjective assessment of each were separately ranked. However, if the criteria were not separately ranked, a plaintiff could not identify which criteria had adverse impact.[78] If the relative weight of each component practice (degree requirement, reference check, and interview) is not identified, a plaintiff could not identify which component had adverse impact. The difficulty is evident. An employer could insulate a selection procedure from disparate impact challenge by making the procedure completely subjective[79] or simply by refraining from memorializing the decision-making process by ranking the subjective judgments and weighting the components. Certainly this method of preventing a disparate impact challenge would be far easier than using quotas and therefore, a far more real danger to the ultimate viability of the proof model.

The degree of specificity possible will vary widely from case to case. In a two-step selection device, it is certainly possible to identify the objectionable step.[80] In a case involving multiple subjective criteria, the plaintiff could never prove which subjective criterion was associated in the employer's mind with a Title VII protected group unless the practice included sufficient ranking and record-keeping procedures. In such a case, it would certainly be inappropriate to require the plaintiff to identify which criterion produced the disparate impact.

Such a construction would sound the death knell of impact analysis in the subjective criteria context, which the Court recognizes would effectively end the efficacy of impact analysis in the objective criteria context as well.[81] This is precisely what the *Watson* decision refused to allow, so the requirement of specific identification must be circumscribed with an appropriate rule of reason, to accomplish the primary goal of the decision—the preservation of a viable disparate impact model.

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77. A degree requirement is analogous to the test requirement in *Teal*, *id.* Where either criteria is an absolute requirement, its impact can be assessed. Where either is simply a factor to be considered along with other criteria, its impact can not be assessed absent a ranking system or formula which prescribes and memorializes the decision-making process.

78. Ironically, that is particularly true where subjective criteria are involved, as the Court has recognized that it is subconscious stereotyping that causes such subjective criteria to produce unlawful disparate impact. *Watson*, 108 S. Ct. at 2786. The plaintiff cannot reasonably be required to identify which subjective criteria are associated in the employer's mind with an unfair stereotype. The only way to prove such an association would be if the same decision-maker evaluated the employment pool multiple times, excluding one criteria each time in order to produce a statistical basis for analysis.

79. *I.e.*, by simply using an intuitive decision-making procedure, relying totally on unbridled discretion.

80. *See Teal*, *supra* note 75.

81. *Watson*, 108 S. Ct. at 2786.

The best reading appears to be that the degree of required specificity must be determined on a case by case basis, depending primarily on how specific it is possible to be. It is never sufficient for the plaintiff to merely allege a statistical imbalance in the employer's workforce.[82] The plaintiff must make some showing that the defendant's practices have caused this imbalance,[83] and the identification of the offending practice will be more or less specific depending on the nature of the challenged practice. The identified practice will often be the inverse of the alternative practice which the plaintiff must offer in stage three of the case. A plaintiff proposing a set of objective criteria in stage three would argue in stage one that the failure to circumscribe employment decisions with such criteria is the offending practice. A plaintiff who accepts the need for subjective criteria for the job involved might argue that appropriate training of the decision-maker would avoid disparate impact, so the failure to provide such training would be the offending practice. Similarly, a plaintiff might challenge the employer's failure to screen its decision-maker for racial or sexual bias, or for the failure to require an independent review of subjective decisions as a guard against illicit bias. These examples demonstrate that a reasoned construction of the identification requirement will not prove an undue burden for plaintiffs. Even in those cases where the offensiveness of the practice is cloaked in the practice's amorphous character, the burden is really no greater than what has always been imposed by stage three of the proof model—proof of the existence of non-discriminatory alternatives.

3. The Causation Requirement

The plurality stated that plaintiffs must prove a causal link between the challenged practice and the disparate impact.[84] At first glance, this might seem to be a difficult burden in the context of subjective practices. However, the plurality explained that such proof is largely a matter of showing a statistical disparity "sufficiently substantial . . . [to] raise such an inference of causation."[85] The Court elaborated on this element of proof by reiterating the well-established principles governing the statistical analysis of the case. "[S]mall or incomplete data sets and inadequate statistical techniques" will not prove causation. Statistics must be based on the applicant pool exclusive of applicants lacking minimal job qualifications.[86] The plurality was articulating in terms of causation the same requirements which earlier opinions have articulated in terms of defining a disparate impact.[87]

The more significant question relates to the degree to which plain-

82. *Id.* at 2788.
83. *See infra* Part III(3).
84. *Watson*, 108 S. Ct. at 2788-89.
85. *Id.* at 2789.
86. *Id.* at 2790.
87. *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (insufficiency of statistics to show impact of exclusion of methadone users); Dothard v. Rawlinson, 433 U.S. 321 (1977) (sufficiency of statistics to show impact of height/weight requirement).

tiffs must, for purposes of a *prima facie* case, prove the lack of other causes for the statistical imbalance. The plurality was clearly concerned that:

> It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.[88]

The *Watson* plurality thus emphasized that the disparate impact proof model does not require an employer to prove causes for statistical imbalance other than the challenged employment practice.

It is important to note that the *Griggs/Albemarle* articulation has never required an employer to prove the lack of causation. When defendants have offered causation proof, it has always been as rebuttal to the plaintiff's causation proof in the *prima facie* case. The burden of proof on causation has never shifted to the Title VII defendant.

The *Watson* plurality opinion may stand for the proposition that, where a plaintiff's statistical analysis of the impact of the challenged practice is not otherwise sufficient to prove causation, a plaintiff may be required to disprove other possible causes. However Justice O'Connor's primary point on causation is simply that the burden of proof does not shift to the defendant, but remains with the plaintiff through all stages of the proof model.[89]

Therefore, the plurality's discussion of causation did not create a new standard. Rather, the opinion emphasized that statistical proof must be sufficient to show causation, and that the employer is never required to shoulder the burden of proof on causation. Both principles were already a part of the pre-*Watson* model.

4. Legitimate Business Reasons

In order to rebut a *prima facie* case of disparate impact, an employer has traditionally been required to defend the challenged practice by a showing of "a manifest relationship to the employment in question"[90] or a "genuine business need."[91] The *Watson* plurality referred approvingly to the *Griggs/Albemarle* "business necessity or job relatedness" defense[92] as one of the constraints on disparate impact, which insures that employers will not have to use quotas or preferential treatment.[93]

88. *Watson*, 108 S. Ct. at 2787 (citation omitted).

89. It is also important not to confuse the plurality's discussion of causation with the issue of proper allocation of burden of proof on job relatedness. *Infra* at Part III(5).

90. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

91. *Griggs*, 401 U.S. at 432; *Albemarle*, 422 U.S. at 434.

92. The two terms have traditionally been used interchangeably. Connecticut v. Teal, 457 U.S. 440, 446 (1982); *Griggs*, 401 U.S. at 432; SCHLEI & GROSSMAN, supra note 27, at 1329-30.

93. *Watson*, 108 S. Ct. at 2791.

Hence, it would appear that the "business necessity" standard of justification was reaffirmed.[94]

But the viability of that standard was then called into question within the same paragraph by the plurality's odd use of disparate treatment language to introduce its discussion of stage three:

> [W]hen the defendant has met its burden of producing evidence that its employment practices are based on *legitimate business reasons* . . . .[95]

The term "legitimate business reasons" was not defined or explained in the opinion. Nor was the phrase supported by a citation to precedent which would clarify its meaning in this context. This language, taken at face value, might indicate a lowering of the traditional "business necessity" standard.[96] However, a better reading is that the plurality was not really deviating from the pre-*Watson* standard. If "legitimate business reasons" were construed as a lower standard, the opinion would be incoherent, as it also affirmed the "business necessity standard." In the sentence preceding the "legitimate business reasons" clause, the plurality expressly reaffirmed the more specific articulation of this burden. The term "legitimate business reasons" was used only in an introductory clause for another element of the proof model. The standard which the court clearly articulated for stage two is "manifest job relatedness," citing *Griggs* with approval.[97] So the plurality opinion should not be read as diminishing this burden.

5. Burden Of Production

The same subordinate clause which introduced the "legitimate business reasons" terminology also spoke of the defendant as having a "burden of producing evidence" to rebut the *prima facie* case. At this stage of the case, the pre-*Watson* proof model required the defendant to *prove* manifest job relatedness—not merely to produce evidence.[98] The issue is whether the plurality was actually purporting to modify this standard to a mere burden of production. In disparate treatment cases, which use the "legitimate business reasons" language, the employer does has only a burden of production, so there is some reason to believe

94. In the specific context of subjective criteria, the use of such criteria will usually be justifiable for those upper echelon positions from which women and minorities are still being excluded. *Id.* However, the plaintiff may effectively challenge the manner in which such criteria are measured. For example, it might be argued that some "subjective" traits are actually measurable by psychological testing, that training of the decision-maker could minimize the unfair stereotyping which causes disparate impact, that screening of decision-makers to avoid illicit bias could lessen disparate impact, or that independent review of employment decisions could counteract the effect of such bias. Cases challenging subjective decision-making *per se* will be viable only for those jobs where objective performance tests are feasible. Most subjective practice cases will turn on the employment procedures rather than the criteria being used.

95. *Id.* at 2790 (emphasis added).

96. *See supra* note 29.

97. *Watson*, 108 S. Ct. at 2790.

98. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

that the *Watson* plurality articulated a new and lowered standard for disparate impact.

However, there are also reasons to conclude that the defendant's burden is still the same. The plurality never suggested that it was changing the burden, but purported to be articulating well-settled standards. The sentence containing the "burden of production" language cited with approval *Albemarle Paper Co.* which holds that the employer has the burden of *proving* job relatedness.[99] The previous sentence stated that "an employer has the burden of showing that any given requirement must have a manifest relationship to the employment in question," citing *Griggs* which also places such a burden of proof on the defendant.[100]

The better reading is that the *Watson* plurality acknowledged that the defendant has this burden of proof, and merely stressed that the burden of proving the fact that discrimination (that is, disparate impact) has been caused by a particular practice never shifts. The plurality opinion states:

> Although we have said that an employer has "the burden of showing that any given requirement must have a manifest relationship to the employment in question," . . . such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.[101]

The issue on which the burden of proof remains with the plaintiff is the causation issue. This does not deviate from settled precedent, and does not necessitate lessening the defendant's burden on the issue of job relatedness.

The plurality articulated no intent to change the burden and offered no articulated reason for varying from that burden in subjective practice cases. In fact, the Court observed that the employer will often find it easier in the context of subjective practices to show job relatedness than in the context of objective practices.[102] So the extension of the proof model to subjective cases provides no reason to lighten the job relatedness burden.

Moreover, the plurality's passing use of the word "producing" does not rise to the level of a coherently defined burden of production. True burdens of production should state the quantum of evidence to be produced, since those quanta may be of varying degrees. A party may face a burden to produce a scintilla of evidence, significant evidence, substantial evidence, or any other quantum the court may prescribe. If the *Watson* language prescribed a burden of production, it created a problem for lower courts by failing to prescribe the quantum of evidence required.

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99. *Albemarle*, 422 U.S. at 425.
100. *Griggs*, 401 U.S. at 432.
101. *Watson*, 108 S. Ct. at 2790 (quoting from *Griggs*, 401 U.S. at 432).
102. *Id.* at 2791.

Still, footnote two of Justice O'Connor's opinion implied that the plurality intended to change some of the evidentiary standards. The plurality stated that "each verbal formulation used in prior opinions to describe the evidentiary standards" in disparate impact cases may not "automatically apply" in light of *Watson*. The difference between "business necessity" and "legitimate business reasons" may be a mere difference in verbal formulation. However, the difference between a burden of proof and burden of production is certainly more than a mere difference in "verbal formulation." Considering the case as a whole, the better view is that the employer still has the burden of proof on the issue of job relatedness. However, the opinion is far from clear, and one would hope that the Court will resolve this issue at its earliest opportunity.[103]

6. Validation Studies

In addition to raising questions as to the quantum of evidence required to rebut a *prima facie* impact case, the plurality opinion left open the question of the kind of evidence which the employer must produce. The job relatedness of most objective criteria is measurable by validation studies. However, the Bank in *Watson* contended that subjective practices are not amenable to such validation studies. The plurality opinion was again somewhat inconsistent in its discussion of this issue. It began by noting that "[s]tandardized tests and criteria, like those at issue in our previous disparate impact cases, can often be justified through formal 'validation studies,' which seek to determine whether discrete selection criteria predict actual on-the-job performance."[104] Yet the plurality went on to acknowledge the employer's concern that the defense of subjective criteria with formal validation studies would often be impossible, or at least so expensive as to be impracticable. The plurality responded to this concern by stating that formal validation studies have never been absolutely required, even in the objective practice context.[105] In terms of the subjective cases, the opinion proceeded:

> In the context of subjective or discretionary employment decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of a "manifest relationship to the employment in question." It is self-evident that many jobs, for example those involving managerial responsibilities, require personal qualities that have never been considered amenable to standardized testing.[106]

Thus, the plurality opinion resolved the defendant's concern that formal validation studies would be unduly expensive by clarifying that such vali-

103. It is possible that the Court will resolve this issue more clearly in Atonio v. Ward's Cove Packing Co., 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988), during the Spring term of 1989. However, the employers in *Atonio* have not directly argued that a Title VII defendant does not have the burden of proof on job relatedness. *Atonio* may turn instead on the lower court's ruling as to a shifting of burden of proof on causation.

104. *Watson*, 108 S. Ct. at 2787.

105. *Id.* at 2790-91.

106. *Id.* at 2791.

dation studies are not always required. Beyond that, however, the plurality opinion gave the lower courts little guidance as to what kinds of evidence may be adequate to validate employment practices. The plurality recognized the availability of formal validation studies to measure the job relatedness of a practice. It implicitly recognized and affirmed the use of such validation studies in appropriate contexts, citing *Albemarle Paper Co.* with approval.[107] It is clear that such evidence is still appropriate. On the other hand, the plurality contemplated that some subjective practices (or at least some subjective criteria) will be so manifestly job related that job relatedness is "self-evident."[108] This implies that little or no evidence will be needed to justify the employer's practice.[109] In the absence of more specific guidance from the Court, it seems that the lower courts are left to resolve on a case-by-case basis the questions of the degree and manner of proof required to establish manifest job relatedness.[110]

The plurality has not so much articulated a new standard governing the kind of evidence required for the rebuttal case as it has recited the flexibility of the pre-*Watson* standard, and extended that flexibility even further in light of the extension of the proof model into new and even more varied employment practices. Some practices, and particularly some criteria, may be easily justified without formal validation studies, but some subjective practices may be subject to more scientific validation procedures.[111] The plurality decision could be read as holding that scientific proof is not required even when available.[112] However, it is not reasonable to construe the plurality opinion as relieving defendants of the responsibility to produce whatever evidence of job relatedness is reasonably available and probative.

7. Alternative Practices

If the employer succeeds in validating its employment practice, the

107. *Id.* at 2787.

108. *Id.* at 2791.

109. The kind of practice falling between these two ends of the continuum, and the kind of evidence required to validate such a practice is an open question.

110. Lower courts will need to consider the specific practice which is being challenged in deciding the kind of evidence which will defend it. While certain subjective criteria may be self-evidently and manifestly related to a managerial job, the method of measuring the employee against that criteria may be the subject of challenge. The Court has given no guidance as to what kind of evidence will be required to validate the application aspect of the practice, as distinguished from the criteria aspect. Since the criteria aspect will ordinarily be so easy for the employer to defend, it is likely that most of these cases will focus on the application aspect.

111. *Watson*, 108 S. Ct. at 2795. The brief of the American Psychological Association, submitted as *amicus curiae* in *Watson*, sets out methods for what it calls "scientific validation" of subjective devices such as job interviews. Brief of American Psychological Ass'n at 4-22, Watson v. Ft. Worth Bank & Trust, 108 S. Ct. 2777 (1988) (No. 86-6139). *See also* Bartholet, *supra* note 6, at 987-88.

112. Such a reading of *Watson* would have little practical effect if the defendant's burden on the issue of job relatedness remains one of persuasion. If the plaintiff produces competent scientific evidence of invalidity of a practice, the defendant will probably need competent scientific evidence to counter it, even in the absence of a rigid rule requiring formal validation as an element of the rebuttal case.

burden falls on the plaintiff to offer a non-discriminatory alternative practice which the employer could have used. The questions unanswered by the *Watson* plurality opinion are: (a) how much less discriminatory must the alternative practice be, (b) what kind of evidence will support that practice, in light of the fact that the practice was not used and both the employer's practice and the suggested alternative will often be at least partly subjective, and (c) how adequately must the alternative practice address the employer's legitimate business interests?

As for the degree to which the alternative practice must diminish the disparate impact, the Court was silent. Presumably, this issue is left to be resolved on the same case-by-case basis which the plurality has prescribed for evaluating the disparity of impact in the *prima facie* case.[113] With regard to the nature of proof on this inherently speculative question, the only way to preserve the validity of the impact model is to allow the plaintiff a good deal of latitude. The plaintiff challenging a subjective practice will usually be challenging the procedure rather than the criteria,[114] and the plaintiff will usually be forced to rely, in stage three, on expert testimony that certain types of procedures usually have less adverse impact than the procedures used by the defendant. Of course, the defendant will seek to produce opposing expert testimony. However, all of this evidence will, of necessity, be relatively speculative.

The issue on which the language of the plurality opinion is most confusing is that of how adequate the alternative practice must be from the standpoint of the employer's legitimate interest. Initially, the plurality stated, "the plaintiff must show that other tests or selection devices, without a similarly undesirable racial effect, *would also serve* the employer's legitimate interest in efficient and trustworthy workmanship."[115]

However, in the next sentence the plurality recited factors pertinent to "determining whether [the alternative practice] *would be equally as effective* as the challenged practice in serving the employer's legitimate business goals."[116] While this language could be read as a holding that even a *de minimis* difference in cost, convenience, or efficiency could justify a severely discriminatory practice notwithstanding the availability of substantially adequate and non-discriminatory alternatives, this reading is certainly not a reasoned approach. Proof of equal effectiveness, if strictly and narrowly construed, would rarely be possible. Further, this reading of *Watson* would elevate the most trivial interest of the employer above the plaintiff's and society's interests in equal employment oppor-

113. *Watson*, 108 S. Ct. at 2788.

114. *See supra* Part III(5).

115. *Watson*, 108 S. Ct. 2790 (emphasis added) (citing with approval *Albemarle*, 422 U.S. at 425).

116. *Id.* (emphasis added). The next sentence states that those factors would be pertinent to determining whether the challenged practice is "*the functional equivalent of pretext* for discriminatory treatment." *Id.* The standard and function of stage three is further complicated by this disparate treatment language, again blurring the two models and harkening back to intent. *See infra* note 135.

tunity, and that cannot be the intent of a decision extending the disparate impact model beyond its prior scope. Nor does the plurality opinion state that strict equality of effectiveness is the test. Rather the *Albemarle Paper Co.* standard is affirmed.

The question must remain one of reasonableness. Such factors as the cost, convenience, and efficiency of the competing practices must be balanced against the difference in the degree of disparate impact affected by the competing practices in order to determine whether the use of the challenged practice was discriminatory.[117]

D. *Precedential Value and Scope of Application of the New Disparate Impact Articulation*

The fact that *Watson* is a plurality decision calls into question its precedential value.[118] It is well settled that affirmances by an equally divided Court do not bind lower courts as to principles of law.[119] But the precedential value of decisions where no single rationale is embraced by a majority of the Court presents a more difficult issue. The "holding" of the Court, in such cases, is defined as "the position taken by those members who concurred in the judgment on the narrowest grounds."[120] Just what constitutes the "narrowest grounds" is unclear. Some have suggested that the narrowest opinion is that which, because it does not enunciate broad rules of law, renders the decision applicable to the fewest number of cases.[121] Under this definition, Justice Stevens' concurrence in *Watson* would be the holding of the case since he postpones the enunciation of evidentiary standards for another day. Another approach is to view the narrowest opinion as the one which departs least from the status quo.[122] Under this standard, the opinion of Justice Blackmun could be considered the holding, since it merely repeats the evidentiary standards in earlier disparate impact cases.

Not only is the precedential value of the plurality unclear, but the scope of its application is also unclear. The opinion avoided the issue as to whether its redefinition of disparate impact was intended to apply only to subjective criteria cases, or to all cases of facially neutral employment practices.

The express reason for the rearticulation was clearly occasioned by

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117. This notion of balancing has not been explicitly discussed by the Court, but it has sometimes been implicit in earlier opinions. *See* Dothard v. Rawlinson, 433 U.S. 321, 335 (1977) (balancing strength of evidence on business necessity with consequences of incorrect decision).

118. Further, the plurality's discussion of the evidentiary standards applicable to disparate impact analysis is dicta.

119. *See, e.g.*, United States v. Pink, 315 U.S. 203 (1942); Hertz v. Woodman, 218 U.S. 205 (1910).

120. Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976). *See also* Marks v. United States, 430 U.S. 193 (1977).

121. Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 763 (1980).

122. *Id.* at 764.

the application of disparate impact analysis to subjective employment practices. Justice O'Connor stated in footnote two:

> [W]e believe that this step [of extension to subjective employment practices] requires us to provide the lower courts with appropriate evidentiary guidelines, as we have previously done for disparate treatment cases. Moreover, we do not believe that each verbal formulation used in prior opinions to describe the evidentiary standards in disparate impact cases is automatically applicable in light of today's decision. . . . This congressional mandate [against preferential treatment and quotas] requires in our view that a decision to extend the reach of disparate impact theory be accompanied by safeguards against the result that Congress clearly said it did not intend.[123]

This language emphasizes that the evidentiary guidelines are intended to minimize the risk that extension of the proof model to subjective practice cases would force employers using subjective practices to adopt secret quotas. The use of the word "automatically" indicates that the pre-*Watson* evidentiary standards may still be viable in some cases, but may not apply in others. Thus, the pre-*Watson* standards may still apply in the objective criteria context but not in the subjective criteria context.

Justice O'Connor also introduced the rearticulation by stating:

> We recognize, however, that today's extension of that theory into the context of subjective selection practices could increase the risk that employers will be given incentives to adopt quotas or to engage in preferential treatment. Because Congress has so clearly and emphatically expressed its intent that Title VII not lead to this result, we think it imperative to explain in some detail why the evidentiary standards that apply *in these cases* should serve as adequate safeguards against the danger that Congress recognized.[124]

The antecedent to "these cases" may well be "subjective selection procedures," another indication that the new standards are required only because of the particular dangers of application to subjective criteria.[125]

It is noteworthy that Justice Blackmun's concurring opinion seems to understand the plurality's new articulation of the evidentiary standards as applying only to subjective employment practices. He stated:

> In so doing, [extending disparate impact analysis to subjective practices] the plurality projects an application of disparate impact analysis to subjective employment practices that I find to be inconsistent with the proper evidentiary standards and with the central purpose of Title VII.[126]

He then went on to call for the traditional statement of disparate impact

123. *Watson*, 108 S. Ct. at 2788 n.2.

124. *Id.* at 2788 (emphasis added) (citation omitted).

125. The ambiguity as to the scope of the applicability of the *Watson* standard is noted in Note, *The Supreme Court, 1987 Term—Leading Cases*, 102 HARV. L. REV. 143, 308, 316 (1988).

126. *Watson*, 108 S. Ct. at 2792 (Blackmun, J., concurring).

evidentiary standards to subjective criteria cases.[127] Even more intriguing is Justice O'Connor's citation to Justice Blackmun's concurrence:

> Moreover, we do not believe that each verbal formulation used in prior opinions to describe the evidentiary standards in disparate impact cases is automatically applicable in light of today's decision. Cf. *post*, at 2791, (Blackmun, J., concurring in part and concurring in judgment).[128]

Justice O'Connor's use of the signal "Cf," generally used to introduce authority which is sufficiently similar to the author's proposition that the cited authority lends support to the author's proposition, may indicate agreement between the plurality and Justice Blackmun's concurrence on the question of the scope of application of the plurality's standards.

Finally, the specific changes in the evidentiary standards appear to be adaptations designed to address the unique problems presented by subjective employment practices, and seem to be unwarranted in the context of objective practices. The Court recognized that objective criteria can be evaluated by formal validation studies. However, subjective criteria may not be so scientifically verifiable. Hence, the Court re-articulated and arguably relaxed the validation element of the defendant's rebuttal case.[129] This relaxation is clearly intended for subjective criteria cases, and the Court's recognition of the availability of better evidence regarding objective criteria belies any claim that these new evidentiary standards are meant to apply in the objective criteria context. Also, the plurality expressly required that in cases of mixed subjective and objective criteria, the specific objectionable practice must be isolated.[130] The Court did not explain this particular need for specific identification,[131] but it may be surmised that the need to isolate the specific component is especially necessary in this context because somewhat different evidentiary standards will apply to different practices depending on whether they are subjective or objective.

Yet, there are also indications that the new standards are applicable to all disparate impact cases. The Court recognized that subjective and objective practices are conceptually similar in that they are facially neutral but may adversely impact a protected class.[132] And the plurality's discussion of the newly articulated standards referred to "the standards of proof in disparate impact cases," without limiting the scope of this phrase to subjective practices.[133] The practical difficulties of distinguishing between subjective and objective criteria (particularly in a multi-component system) and applying two different versions of the proof model may simply be unworkable.

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127. *Id.* at 2792-97.
128. *Id.* at 2788 n.2.
129. *Id.* at 2790.
130. *Id.* at 2788.
131. *Watson* was not a case of mixed subjective and objective criteria. It challenged only subjective criteria.
132. *Watson*, 108 S. Ct. at 2786.
133. *Id.* at 2791.

In the final analysis, it is most likely that the Court has simply not decided which, if any, of the newly articulated standards will apply to all disparate impact cases. And if the plurality is itself divided, or at least undecided, on the application of its own new standards, this is perhaps the clearest indication that the Court is in disarray in its approach to disparate impact.

IV. CONCLUSION

The split of the *Watson* court and the importance of the *Watson* issues virtually ensure that the Court will have another occasion to deal with the disparate impact of subjective criteria.[134] One would hope that the Court will take the opportunity to deal with the problems raised by *Watson's* approach and clarify its ambiguities. The Court should clarify the following issues: (1) that while a plaintiff must specifically identify the challenged practice, the entire procedure can be challenged if the effects of its component parts cannot be separately analyzed; (2) whether the defendant's burden is one of persuasion or production, and if production, what quantity of evidence is required; (3) that while validation studies are not always required, they are the preferred evidence and should be produced where the challenged practice is amenable to validation study at reasonable cost; (4) that in stage three, the adequacy of an alternate practice is determined by balancing the degree of lessened impact of the alternative procedure with the degree to which the alternative procedure would also serve the employer's legitimate needs; and (5) that the plaintiff need not prove that the alternative procedure would serve the employer equally as well as the challenged procedure, so long as it would serve reasonably well.

Until the Court addresses these areas, the language of the plurality opinion will almost certainly invite inconsistent results in the lower courts. The three-Justice concurring opinion authored by Justice Blackmun pinpointed the source of the confusion, as the plurality frequently affirmed traditional impact standards, then elaborated on those standards using language drawn from disparate treatment cases.[135] Reconciling these inconsistencies will be a challenging task for the lower courts. The key to sound interpretation of this plurality opinion is to look beyond a superficial reading of any single phrase, especially one which is contradicted by another phrase or by the plurality's favorable

134. Atonio v. Ward's Cove Packing Co., 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988) now pending before the Court, provides one such opportunity. However, if the Court confines itself to the issues directly presented, many of the issues raised by *Watson* will remain open.

135. *Watson*, 108 S. Ct. at 2791-93. It is argued in Note, *Title VII - Disparate Impact Challenges to Subjective Employment Decisions*, 102 HARV. L. REV. 308, 317-20 (1988), that the plurality is attempting to reframe its basic doctrine of disparate impact analysis; i.e., viewing disparate impact as evidence of invidious intent rather than as a prohibited effect without regard to intent. There are hints to that effect in the plurality decision. However, the language of the plurality and its comprehensive rationale are simply too contradictory and ambiguous to support a conclusion that *Watson* has so fundamentally altered disparate impact doctrine.

citation of traditional impact cases, to consider the chief object of the opinion. The plurality is preserving and extending the impact model. Reading in evidentiary standards which would effectively eviscerate the model is not consistent with preserving it. However, standards which are reasonable for objective practices, but impracticable for subjective practices, may need to be relaxed. The plurality has not specifically defined how this tailoring of the impact model is to be done. That task now falls to the lower courts, guided by reason and a recognition of the continuing importance of equal employment opportunity.

DEFENDING MINING CLAIMS AND MINERAL LEASES IN ENVIRONMENTAL SUITS AGAINST FEDERAL LAND MANAGERS

ERIC TWELKER*

I. INTRODUCTION

A recent development in environmental lawsuits is threatening federal mining claimants' and federal mineral lessees' interests in federal public lands. Environmental groups are challenging decisions by the Bureau of Land Management ("BLM") and Forest Service that create property interests or development rights. In a worst case scenario, courts could find that claimants and lessees never had valid property interests.

The suits jeopardize the title of thousands of mining claims and mineral leases. The cases presenting the most striking examples are *National Wildlife Federation v. Burford*,[1] *Connor v. Burford*,[2] *Sierra Club v. Watt*,[3] and *Bob Marshall Alliance v. Watt*.[4] From the claimants' and lessees' point of view, these decisions granted environmental groups sweeping, though somewhat ill-defined, relief. For example, hundreds of federal land management decisions have been enjoined in a single action.[5]

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1. 676 F. Supp. 271 (D.D.C. 1985), *preliminary injunction aff'd*, 835 F.2d 306 (D.C. Cir. 1987), *dismissed*, No. 85-2238, slip op. (D.C. Cir. Nov. 4, 1988), *appeal docketed*, No. 88-5397 (D.C. Cir. Nov. 14, 1988). This suit challenges Federal Land Policy and Management Act and National Environmental Policy Act procedural compliance for withdrawal revocations and classification terminations made after January 1, 1981. A preliminary injunction was issued on February 10, 1986 and affirmed by the court of appeals on December 11, 1987, barring the government from approving surface disturbing work. The injunction was dissolved and the case dismissed for want of standing on November 4, 1988. The merits of the case have yet to be addressed. For other comment on the case see Lusting, *Recent Struggles for Control of the Public Lands: Shall We "Deliver it up to the Wild Beasts?"*, 57 U. COLO. L. REV. 593, 612-16 (1986) (National Wildlife Federation attorney discusses early developments in case).

2. 605 F. Supp. 107 (D. Mont. 1985), *aff'd*, 848 F.2d 1441 (9th Cir. 1988), *petition for cert. filed sub nom.* Sun Exploration & Prod. Co. v. Conner, Nov. 25, 1988. Because an Environmental Impact Statement ("EIS") was not done for oil and gas lease issuance, the court set aside the administrative actions that were precursors to lease issuance, placing the leases in jeopardy. The court of appeals reduced the leases to "rights of first refusal." 848 F.2d at 1447 n.16.

3. 608 F. Supp. 305 (E.D. Cal. 1985). This case set aside the decision of the Secretary of the Interior to remove certain lands from wilderness study. The complaint was filed in federal district court on January 13, 1983 and decided on April 18, 1985. For other comment on this case see Lustig, *supra* note 2.

4. Bob Marshall Alliance v. Watt, 685 F. Supp. 1514 (D. Mont. 1986), *aff'd*, Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988), *petition for cert. filed sub nom.* Kohlman v. Bob Marshall Alliance, Nov. 29, 1988. This case is similar to *Conner v. Burford*, except there is no issue of joinder of absent lessees.

5. Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985) (711 oil and gas leases affected); *Sierra Club v. Watt*, 608 F. Supp. at 321 ("Hundreds, . . . perhaps thousands of varying interests"); National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987)

The challenges by environmental groups are based on statutes designed to bring environmental considerations before federal decision-makers. The National Environmental Policy Act[6] ("NEPA") and Federal Land Policy and Management Act[7] ("FLPMA") sections at issue merely dictate decision process, and are not intended to mandate land management decisions favoring environmentalists.[8] The primary interest of environmental groups such as the Sierra Club[9] and the National Wildlife Federation[10] is not procedure. These groups are interested in what is happening on the land, specifically, whether mineral extraction is degrading environmental values. But since a court will more closely review an agency's deviation from mandated procedure than the substance of the decision itself, the statutes are a potent weapon in the environmental lawyer's arsenal.[11] The claimants and lessees are caught in the middle of the exchange between environmentalists and federal agencies.

Lawsuits that indirectly challenge leases and claims are unlike environmental challenges to fixed projects such as highways or dams. Those affected often times do not know exactly what is at stake. When the challenge is indirect, unexplored, or partially explored, proper ties have only speculative value and the claimants and lessees are often unwilling or unable to engage in a fight with well-heeled environmental public interest law firms. While the federal government has defended the suits, their interests and those of the claimants and lessees may diverge. Industry oriented public interest law firms—in particular, Mountain States Legal Foundation—have represented the claimants and lessees.[12] But since the principal parties are public interest firms and the government, the cases are often argued on a public policy level without concern for a given piece of private property.

In the context of the four cases mentioned above, this paper addresses the rights and remedies of claimants and lessees before, during and after environmental procedural suits that indirectly challenge federal mining claims and mineral leases.

(7000 claims and 1000 leases affected by 814 agency actions revoking withdrawals or terminating classifications). *See also* Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466 (9th Cir. 1986) and Sierra Club v. Penfold, 659 F. Supp. 965 (D. Alaska 1987) (both cases halting numerous mining operations).

6. 42 U.S.C. §§ 4321-47 (1982).

7. 42 U.S.C. §§ 1701-84 (1982).

8. *See* Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227-28 (1980).

9. Sierra Club Legal Defense Fund represents the plaintiff in Sierra Club v. Watt, 608 F. Supp. 305 (E.D. Cal. 1985); Sierra Club v. Penfold, 659 F. Supp. 965 (D. Alaska 1987); Bob Marshall Alliance v. Watt, 685 F. Supp. 1514 (D. Mont. 1986); and Northern Alaska Environmental Center v. Hodel, 803 F.2d 466 (9th Cir. 1986).

10. The National Wildlife Federation represents the plaintiff in National Wildlife Federation v. Burford, 835 F.2d 305 (D.C. Cir. 1987), and Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985).

11. *See infra* notes 35-45 and accompanying text.

12. Mountain States Legal Foundation represents claimants and lessees in *Sierra Club v. Watt, Connor, National Wildlife Federation,* and *Bob Marshall Alliance.* Pacific Legal Foundation of Sacramento, California, represents the Alaska Miners Association in *Northern Alaska Environmental Center* and *Sierra Club v. Penfold.*

II. ADMINISTRATIVE DISCRETION AND MINERAL PROPERTY INTERESTS IN PUBLIC LANDS

Mining claims and mineral leases are at risk in environmental lawsuits against the government because the suits attack the administrative decisions that created the development rights or property title. An understanding of how the administrative procedures at issue apply to public land decisions is necessary to understand the position of the claimants and lessees.

A. *Administrative Discretion in Creation of Mineral Interests in Public Lands*

Public attitudes and political processes combined with vested economic interests shaped the nature and means of acquiring mineral interests in public lands.[13] In the nineteenth century, the public perceived the resources of the public lands to be virtually inexhaustible. Because there was no perceived need for administrative control, mining claim locators could acquire mineral resources, with the exception of coal, under the General Mining Law of 1872 by being the first to make a valid discovery.[14] By today's standards, patents were issued with relative ease.

In recent years public attitudes have changed; the public and environmental groups now demand vigilant administrative control over extraction of resources from public lands.[15] It is now known these resources are no longer inexhaustible. The law subjects agencies to substantive and procedural constraints.[16] If a procedurally deficient discretionary decision adversely affects members of the public, then they may sue to have the decision "set aside." The suit may jeopardize a mineral lease or mining claim based on the underlying decision.

In the Mineral Leasing Act of 1920,[17] Congress provided the Secretary of the Interior with "discretion" to lease oil, gas and several other minerals. Today, the Secretary must consider environmental concerns. The government may place three types of environmental controls on mineral leases at the lease issuance stage. First, the agency may reject the lease offer for environmental reasons.[18] Second, it may add lease

13. *See generally* PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND ix, 1 (1970); P. GATES, THE HISTORY OF PUBLIC LAND LAW DEVELOPMENT chs. I & XXII (1968); 1 AMERICAN LAW OF MINING ch.4 (2d ed. 1986).

14. General Mining Law of 1872, 30 U.S.C. §§ 22-54 (1982). *See generally* 1 AMERICAN LAW OF MINING § 4.08-.11 (2d ed. 1986) (describes early application of the General Mining Law).

15. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND ch. 7 (1970).

16. *Id.*; *see* Lustig, *supra* note 1.

17. 30 U.S.C. §§ 181-287 (1982). In addition to oil and gas the Mineral Leasing Act covers oil shale, sodium, sulfur and potash. The Acquired Lands Leasing Act of 1947, 30 U.S.C. §§ 351-59 (1982), extended the 1920 Act authority to lands acquired by the federal government.

18. The discretion of the Secretary to reject leases may be limited by FLPMA. *See* Mountain States Legal Found. v. Andrus, 499 F. Supp. 383, 397 (D. Wyo. 1980) (holding that non-action on leases is a *de facto* withdrawal in violation of FLPMA § 204, 43 U.S.C. § 1714 (1982), and that FLPMA § 310, 43 U.S.C. § 1740 (1982) requires that standards for

stipulations to protect environmental values and require reclamation.[19] Third, Congress may restrict or preclude leasing by specific acts[20] or by riders to appropriations bills which preclude expenditures for lease processing.[21]

After a lease is issued, permits are necessary for any kind of surface-disturbing exploration or development work.[22] For example, oil and gas leases require approval of an application for a permit to drill ("APD") for any exploratory or development drilling.[23] Although a land manager may be without the discretion to deny a permit, depending on the lease stipulations,[24] the permit is always subject to terms which are formulated with the exercise of administrative discretion.[25] That exercise of discretion introduces the possibility of environmental litigation based on environmental and land management procedural statutes.

Metallic and other "hardrock" minerals continue to be available for

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lease rejection be placed in regulations); Mountain States Legal Foundation v. Hodel, 852 F.2d 1223 (D. Wyo. 1988) (same issue). *See also* Comment, *Mining and Mineral Leasing on Bureau of Land Management Lands During Wilderness Review*, 30 U. KAN. L. REV. 297 (1982) (case comment on Utah v. Andrus, 486 F. Supp. 995 (D. Utah 1979)); RMOGA v. Andrus, 500 F. Supp. 1338 (D. Wyo. 1980) (prior to reversal on appeal); and Mountain States Legal Found. v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980)). *See infra* notes 226-32 and accompanying text.

19. *See* Muys, Shepherd and Smith, *Environmental Considerations in Public Lands Mineral Leasing and Development* II, 1-5, 10-14, 19-20, in Proceedings, Public Lands Mineral Leasing; Issues and Directions, Natural Resources Law Center, University of Colorado School of Law (June 10-11, 1985) (discussing stipulations); Axline, *Private Rights to Public Oil and Gas*, 19 IDAHO L. REV. 505, 519-51 (1983) (discussing the validity of environmental protection stipulations in federal oil and gas leases); Noble, *Oil and Gas Leasing on Public Lands: NEPA Gets Lost in the Shuffle*, 6 HARV. ENVTL. L. REV. 117, 133-39 (1982) (discussion enforceability of stipulations); Watson, *Mineral and Oil and Gas Development in Wilderness Areas and Other Specially Managed Federal Lands in the United States*, 29 ROCKY MTN. MIN. L. INST. 37 (1983) (good practical overview); Martin, *The Interrelationships of the Mineral Lands Leasing Act, the Wilderness Act and the Endangered Species Act: A Conflict in Search of Resolution*, 12 ENVTL. L. 363, 411-20 (1982) (criticizing use of stipulations). Use of restrictive stipulations must be justified by the record before the agency. James M. Chudnow, 76 I.B.L.A. 167, GFS (O&G) 289 (1983). *See infra* notes 86-89 and accompanying test. In national forests the Secretary of Agriculture is responsible for surface resources, while the Secretary of Interior has authority over subsurface resources. While the issuance of leases is nominally the responsibility of the Secretary of the Interior, a 1987 amendment to the Mineral Lands Leasing Act gives the Secretary of Agriculture the authority to veto leases on national forest lands. 30 U.S.C. § 226(h) (1982).

20. *E.g.*, The Wilderness Act, 16 U.S.C. § 1133(d)(3) (1982) (precludes leasing in designated wilderness areas after Dec. 31, 1983).

21. *E.g.*, Interior and Related Agencies Appropriations Act for Fiscal Year 1985, Pub. L. No. 98-473, § 308, 98 Stat. 1871 (1985).

22. FLPMA § 302(b), 43 U.S.C. § 1732 (1982); 43 C.F.R. pt. 3045 (1986). *See also* 1 LAW OF FEDERAL OIL AND GAS LEASES §§ 16.05[2], 16.05[4], 17.05 (1986) (geophysical activities and bond requirements). Permits to do surface disturbing work on national forest lands are covered by 36 C.F.R. § 251.50-251.64 (1986) and FOREST SERVICE MANUAL § 2820.

23. 43 C.F.R. subpt. 3162 (1986). *See generally* 1 LAW OF FEDERAL OIL AND GAS LEASES § 16.07[1][c] (1986).

24. *See* Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983) (stipulations giving authority to deny later activity approved); Getty Oil Co. v. Clark, 614 F. Supp. 904, 915 (D. Wyo. 1985) (stipulations giving authority to deny later activity approved).

25. *E.g.*, 614 F. Supp. at 915.

location under the General Mining Law of 1872.[26] A claimant benefits from the location system because the discretion of administrators is severely limited. Until the 1960's, a claimant could locate a claim, make a discovery, and proceed to patent without encountering a discretionary decision by a land manager.[27] Without the exercise of administrative discretion the environmental procedures could not apply.[28]

More recently, agencies have been given limited authority to exercise discretion over activities conducted under the Mining Law. The substantive mandates of the Forest Service Organic Act of 1897,[29] Surface Resources Act of 1955,[30] and FLPMA[31] are examples. Under these acts, Forest Service and BLM administrators may exercise a limited, but significant, amount of discretion to prevent "undue degradation" or damage of surface resources. Regulations now require a "plan of operations" for most surface-disturbing work on unpatented federal mining claims. The agency reviews the "plan," and in its discretionary power, imposes conditions to prevent unacceptable surface damage.[32] While normally a land manager may not totally deny operations on mining claims,[33] any conditions imposed on the plan involve administrative discretion and the consequent procedural restrictions, including the possibility of an environmental impact statement ("EIS") under NEPA.[34]

26. 30 U.S.C. § 22-54 (1982). *See generally* 2 AMERICAN LAW OF MINING tit. IV (2d ed. 1986) (comprehensive discussion of requirement of current location system).

27. *See* Clipper Mining Co. v. Eli Mining & Land Co., 194 U.S. 220, 227 (1904) (valid claim segregates property from public domain and makes it the property of the locator through patent).

28. *See* South Dakota v. Andrus, 714 F.2d 1190 (8th Cir. 1980), *cert. denied*, 449 U.S. 822 (1980) (patent issuance is a ministerial act). *South Dakota v. Andrus* is being challenged, at least indirectly, in a current suit by the State of Colorado. Lamm v. Hodel, No. 87-F-190 (D. Colo. filed Feb. 4, 1987).

29. Act of June 4, 1897, ch. 2, 30 Stat. 34-36 (codified as amended at 16 U.S.C. §§ 475-82, 551 (1982)). Discretionary administration was introduced with the promulgation of regulations by the Forest Service in 1974.

30. 30 U.S.C. §§ 611-15 (1982). *See* United States v. Richardson, 599 F.2d 290 (9th Cir. 1979) (Surface Use Act of 1955 does not restrict activity reasonably incident to mining), *cert. denied*, 444 U.S. 1014 (1980).

31. 43 U.S.C. § 1732(b) (1982) (department shall take action necessary to prevent unnecessary and undue degradation of lands). Regulations interpreting this provision for activity conducted pursuant to the General Mining Law are found at 36 C.F.R. pt. 228 and 43 C.F.R. subpts. 3802 & 3809. *See generally* Kimball, *Impact of BLM Surface Management Regulations on Exploration and Mining Operations*, 28 ROCKY MTN. L. INST. 509, 563-70 (1982).

32. Forest Service regulations are found at 36 C.F.R. §§ 228.4, 228.8 (1986). BLM regulations are found at 43 C.F.R. §§ 3802.1, 3809.1-3809.2 (1986).

33. Opinion of Solicitor Coldiron, 88 I.D. 909 (October 5, 1981); United States v. Weiss, 642 F.2d 296, 298 (9th Cir. 1980) (regulations based on Organic Act of 1897 must be reasonable). FLPMA §§ 302(b), 601(f) & 603, 43 U.S.C. §§ 1732(b), 1781(f), & 1782 (1982), provide for amendment to the General Mining Law. Of these, section 603 will have the most significant impact on a plan of operations. *See, e.g.*, Keith R. Kummerfeld, 74 I.B.L.A. 106, GFS (Min) 165 (1983).

34. *See* 43 C.F.R. § 3809.1-6(a)(2) (1986) (BLM lands); 36 C.F.R. § 228.5(a)(3) (1986) (Forest Service lands).

B. *Procedural Constraints on the Exercise of Administrative Discretion*

1. The Administrative Procedure Act and Standards of Review

To date, judicial review authorized by the Administrative Procedure Act ("APA"), section 10(3),[35] has been the sole means of obtaining judicial relief for violations of environmental and land management procedure.[36] For example, if a plaintiff alleges an agency violation of NEPA, then the plaintiff must prove that the agency action fails to comply with NEPA when judged by the standards of review found in the APA. If the agency's action does not meet the APA review standards, then the APA authorizes the court to "set aside" the action.[37]

Under the traditional standard, judicial review is limited. A court may "set aside" discretionary agency actions only where they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[38] The decision will stand unless it is a clear error of judgment, did not consider the relevant factors, or was made in reliance on prohibited considerations.[39] The "arbitrary and capricious" standard normally applies to adjudications of decisions to execute an agency action or judgment of factual determinations by agencies.[40]

For procedural violations, the APA provides that a court may set aside an agency action for failure to comply with "procedure required by law."[41] In the absence of a statutorily prescribed standard of review, the courts have upheld agency actions if the procedural compliance is "reasonable."[42]

It is unclear which standard should apply to review of compliance with procedural statutes like NEPA. In preparation of NEPA documents, such as environmental assessments ("EA") or EISs, an agency must exercise its discretion in many substantive ways. For example, it must explain the facts of environmental impact, decide the scope of the proposal, and decide how to contact the public. Yet the entire effort is "procedural."[43] The result of this mix of substance and procedure is a

35. 5 U.S.C. § 702 (1982).

36. *See* 5 B. MEZINES, J. STEIN, J. BRUFF, ADMINISTRATIVE LAW 4502 (1985) (APA only grants right to judicial review; jurisdiction depends on an outside statutory source).

37. 5 U.S.C. § 706(2) (1982).

38. 5 U.S.C. § 706(2)(A) (1982).

39. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983).

40. Strycker's Bay Neighborhood Council v. Karlan, 444 U.S. 223, 227-28 (1980). APA review may have a substantive impact on cases. For example, in *Sierra Club v. Watt*, the court overturned Secretary Watt's decision to exclude tracts of less than 5,000 acres from wilderness study because the record reflected that Watt relied on an incorrect interpretation of section 603 of FLPMA. 608 F. Supp. 305, 342 (E.D. Cal. 1985). *See* Lustig, *Recent Struggles for Control of Public Lands: Shall We "Deliver it up to the Wild Beasts?"*, 57 U. COLO. L. REV. 593, 616-22 (1986) (National Wildlife Federation attorney discusses the decision in *Sierra Club v. Watt*).

41. 5 U.S.C. § 706(2)(D) (1982).

42. Foundation for N. Am. Wild Sheep v. United States Dept. of Agric., 681 F.2d 1172, 1177 (9th Cir. 1982); Conservation Law Found. v. Andrus, 623 F.2d 712, 719 (1st Cir. 1979); Lathan v. Brinegar, 506 F.2d 677, 693 (9th Cir. 1982).

43. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,

split in the circuits on which standard of review should apply.

Some circuits judge the threshold decision on whether to prepare an EIS, and even some factual disputes involving EAs or EISs, by the reasonableness standard. Other circuits use the more narrow arbitrary and capricious standard.[44] The use of different standards for similar procedural statutes within the same circuit, plus the application of an additional "hard look" standard in environmental cases, compounds the problem.[45] In many cases, the result of this apparent split is unclear. But it does appear that courts in the "reasonableness" circuits have more discretion to overturn agency decisions and thus create uncertainty for claimants and lessees.

2. The Environmental Statutes

NEPA is foremost among the environmental statutes that affect mineral property interests in public lands. The purpose of NEPA's EIS requirements is to fully inform federal decision-makers of the relevant environmental concerns[46] attendant to discretionary administrative decisions. The EIS is merely a procedure, which, if properly done, does not affect the agency's discretion as to the substance of the ultimate

Inc., 435 U.S. 519, 558 (1978); Lathan v. Brinegar, 506 F.2d 677, 693 (9th Cir. 1974) (*en banc*).

44. *See* Gee v. Boyd, 471 U.S. 1058 (1985) (White, J., dissenting), *denying cert. to* Gee v. Hudson, 746 F.2d 1471 (4th Cir. 1984) (describes split in circuits on whether arbitrary and capricious standard should be applied to NEPA questions). *See also* Shea, *The Judicial Standard of Review for Environmental Impact Statement Threshold Decision*, 9 B.C. ENVTL. AFF. L. REV. 63 (1980); Comment, *Shall We Be Arbitrary of Reasonable: Standards of Review for Agency Threshold Decisions Under NEPA*, 19 AKRON L. REV. 685 (1986). An agency will be given deference for decisions involving technical and scientific matters. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 101 (1983); Friends of Endangered Species v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985). In application, there may be little difference between the two standards.

45. For example, the Ninth Circuit applies a reasonableness standard to most, if not all, NEPA related decisions. *E.g.*, Friends of Endangered Species v. Jantzen, 760 F.2d 976, 985 (9th Cir. 1985) (reasonableness standard purportedly applied but cases from circuits applying the arbitrary and capricious standard cited); Foundation for N. Am. Wild Sheep v. United States Dept. of Agric., 681 F.2d 1172, 1177 (9th Cir. 1982) (reasonableness standard applied). At the same time the Ninth Circuit has chosen to use the arbitrary and capricious standard in judging the equally procedural consultation requirements of ESA. Village of False Pass v. Clark, 733 F.2d 605, 611 (9th Cir. 1984). The Supreme Court addressed review of the scrutiny an agency has given to considerations mandated by environmental procedural statutes in *Citizens to Preserve Overton Park v. Volpe*. 401 U.S. 402 (1971). The "hard look" requirement was first applied in *Pikes Peak Broadcasting Co. v. FCC*, 422 F.2d 671 (D.C. Cir. 1969), and later used or mentioned in Supreme Court decisions. *See* Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 97-100 (1983); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). The "hard look" has become a judicial standard of review for environmental cases, but it has received some criticism. *See* McGarity, *Beyond the Hard Look: A New Standard for Judicial Review*, 2 NATURAL RESOURCES & ENV'T 32, 68 (1986) (courts should take a less intrusive role); Wald, *Making "Informed" Decisions in the District of Columbia Circuit*, 50 GEO. WASH. L. REV. 135 (1982) (D.C. Circuit judge argues that because it is impossible for courts to become adequately informed, they should not substitute their judgment for that of the agencies). *See generally* D. MANDELKER, NEPA: LAW AND LITIGATION § 3:07 (1984).

46. *See* 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made").

decision.[47]

The actual wording of NEPA's EIS requirement is deceptively simple. The statute requires an EIS to accompany any proposal for a major federal action significantly affecting the quality of the human environment.[48] Past disputes have most often involved the following: what constitutes a "proposal;" what is the required scope of that proposal; and whether an impact is "significant."

Because an EIS is a time consuming, expensive, and politically risky undertaking, there is tremendous incentive to avoid producing one. Consequently, if it is not readily apparent to an agency that the impact of an action is "significant," then it will be inclined to do an EA. In theory, an EA's purpose is to determine whether the action is significant and requires an EIS.[49] If the EA discloses that the proposed action is insignificant, as it usually does, then the agency will make a Finding of No Significant Impact[50] ("FONSI"). If a type of action is almost always insignificant, then the agency may avoid the obligation to do an EA by use of a "categorical exclusion."[51] To meet the requirements of NEPA and the regulations, an agency must rely on either an EIS, an EA and FONSI, or a "categorical exclusion."[52]

The NEPA counts in the suits discussed in the paper have questioned the agency's determination how many future or related actions should be included in the NEPA review. The issue is the "scope of the action."[53] In each case, the agency chose to consider a scope of action that did not, by the agency's interpretation, reach the threshold "significant" level. In each case, environmental groups argued that the NEPA review should have considered other actions, either possible future actions or other actions in the area, and therefore, an EIS, a programmatic EIS, or a regional EIS was required.[54]

A number of more specialized statutes have adapted the informa-

47. Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227-28 (1980); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978). *See* Pollock, *Reimaging NEPA: Choices for Environmentalists*, 9 HARV. ENVTL. L. REV. 359, 392-95 (1985) (because review is primarily procedural rather than substantive, the effect of NEPA will be primarily delay); *but see* Weinstein, *Substantive Review under NEPA after Vermont Yankee IV*, 36 SYRACUSE L. REV. 937 (1985) (argues the *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983), will support a significant aspect of substantive review attributable to NEPA).

48. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1982).

49. 40 C.F.R. § 1508.9 (1986).

50. 40 C.F.R. § 1508.13 (1986).

51. 40 C.F.R. §§ 1501.4(a)(2), 1508.4, 1507.3(b)(2)(ii) (1986). Even a categorically excluded action may be subject to the EA or EIS requirements if it has an impact that warrants such considerations. 40 C.F.R. § 1508.4 (1986).

52. *See* Jones v. Gordon, 792 F.2d 821, 827-29 (9th Cir. 1986) (requirement of reasoned explanation not met for actions falling outside of categorical exclusion, but not having an EA or EIS).

53. *See* 40 C.F.R. § 1508.25 (1986) (regulations define scope). *See generally* R. MANDELKER, *supra* note 45, at ch. 9 (discusses scope of NEPA review). *See infra* notes 83-90 and accompanying text.

54. For example, in *National Wildlife Federation*, *Northern Alaska Environmental Center* and *Penfold*, the plaintiffs argued that a programmatic or regional EIS was required to consider cumulative impacts. In *Bob Marshall Alliance* and *Connor*, plaintiffs argued, and the court

tion procedural style of NEPA. For example, section 7 of the Endangered Species Act[55] ("ESA") requires that when agencies make decisions affecting threatened or endangered species, the agency must consult with the United States Fish and Wildlife Service. The ESA differs from NEPA since separate provisions mandate that if actions place threatened or endangered species at risk, then the Fish and Wildlife Service must issue a jeopardy decision and the agency must mitigate the consequences or halt the project.[56] If there is no risk to threatened or endangered species, then the Fish and Wildlife Service will issue a "no jeopardy" opinion and the project may proceed. Another example is section 810 of the Alaska National Interest Lands Conservation Act,[57] ("ANILCA") which requires that federal agencies review impacts on subsistence hunting and fishing prior to making land management decisions in Alaska.[58]

Because each of these statutes may be viewed as requiring a specialized type of environmental impact statement, the courts and parties in environmental procedural suits have applied arguments and analysis developed in consideration of the NEPA claims.[59] Perhaps as a consequence, the briefs of the parties and the opinions of the courts have treated ESA consolation and ANILCA section 810 claims as secondary or subsidiary to NEPA claims. Another reason ESA claims are subsidiary to NEPA claims is because the heightened "reasonableness" standard of review has not been applied in ESA cases.[60]

3. The Land Management Statutes

Because the National Forest Management Act[61] and FLPMA[62] con-

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agreed, that the scope of review should have included full field development with lease issuance. *See infra* notes 83-90 and accompanying text.

55. Endangered Species Act of 1973, Pub. L. No. 93-205, 93 Stat. 1225 (1973) (codified at 16 U.S.C. §§ 1531-1549 (1982)) (section 7 codified at 16 U.S.C. § 1536 (1982)). *See* Martin, *The Interrelationships of the Mineral Lands Leasing Act, the Wilderness Act, and the Endangered Species Act: A Conflict in Search of Resolution*, 12 ENVTL. L. 363, 390-96 (1982) (discusses the intent of the Endangered Species Act and court decisions interpreting that act in the context of the Mineral Leasing Act).

56. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (highest priority is accorded protection of endangered species).

57. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified at 16 U.S.C. §§ 3101-3233 (1982)) (section 810 codified at 16 U.S.C. § 3120). The importance of section 810 was apparently overlooked in commentary on ANILCA shortly after it was passed.

58. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987); Kunaknana v. Clark, 742 F.2d 1145, 1151 (9th Cir. 1984). While section 810's procedural requirement of informing the decision maker is similar to NEPA's, there are important substantive differences between the general environmental concerns of NEPA and the substantive concerns of section 810. Consequently, one will not substitute for the other.

The relationship of section 810 and NEPA may be of critical importance in interpreting the Supreme Court's *Village of Gambell* decision. That decision invalidated a Ninth Circuit standard for issuance of a preliminary injunction that had been applied to both ANILCA and NEPA.

59. *See, e.g.*, Conner v. Burford, 848 F.2d 1441, 1451-58 (9th Cir. 1988).

60. *See, e.g.*, Village of False Pass v. Clark, 733 F.2d 605, 610 (9th Cir. 1984) ("normal" arbitrary and capricious standard applies).

61. National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949

tain numerous procedural requirements for discretionary land management decisions, they also provide numerous bases for environmental procedural suits.[63] One of the pending suits, *National Wildlife Federation*,[64] involves the following FLPMA provisions: (1) the requirement that agencies set forth standards for land management decisions in regulations;[65] (2) the requirement that the agencies provide, in regulations, the opportunity for public participation;[66] (3) the provisions governing withdrawal revocation procedure;[67] (4) the provisions governing classification termination procedure;[68] and (5) the concept of "multiple use."[69] Although *National Wildlife Federation* contains a sampling of the potential problem areas of FLPMA, it is not exhaustive. Parts of FLPMA, including the withdrawal revocation provision at issue in *National Wildlife Federation*, are very complex, and confusing.[70]

The Outer Continental Shelf Lands Act[71] ("OCSLA") is important because many of the issues in the onshore environmental procedural suits have already been litigated for offshore lease sales.[72] Nevertheless, the *Connor*[73] court rejected the application of offshore precedents thereby allowing staged review under both NEPA and ESA to onshore situation.[74] Application of offshore precedent would have allowed sepa-

(1976), Forest and Rangeland Resource Planning Act of 1974, Pub. L. 93-378, 88 Stat. 477 (1974) (codified together at 16 U.S.C. §§ 1600-1614 (1982)).

62. 43 U.S.C. §§ 1701-1784 (1982).

63. *E.g.*, Sagebrush Rebellion v. Hodel, 790 F.2d 760 (9th Cir. 1986) (notice and hearing requirements for withdrawals, FLPMA § 204, 43 U.S.C. § 1714 (1982)); National Wildlife Fed'n v. Burford, 676 F. Supp. 271 (D.D.C. 1985) (withdrawal revocation and classification termination procedure). *See also* Mountain States Legal Found. v. Andrus, 499 F. Supp. 383, 397 (D. Wyo. 1980) (lessees base suit on failure of withdrawal procedure, *see supra* note 18).

64. *See supra* note 1 and accompanying text.

65. Section 310, 43 U.S.C. § 1740 (1982).

66. Section 309, 43 U.S.C. § 1739 (1982).

67. Sections 204(a), (i) & (1), 43 U.S.C. § 1714(a)(i)(1) (1982).

68. Section 202(d), 43 U.S.C. § 1712 (1982).

69. Sections 103(c), 302(a), 43 U.S.C. §§ 1702(c), 1732(a) (1982). The concept of "multiple use" is a substantive mandate of FLPMA rather than a procedural one.

70. In light of the *National Wildlife Federation* suit, the most apparent example of this is the withdrawal "termination" provisions of section 204(1), 43 U.S.C. § 1714(1) (1982). A very plausible reading of this twisted section seems to indicate that all terminations or revocations, no matter how small, must be submitted by Congress. This puts section 204(1) in conflict with sections 204(a) and (i), 43 U.S.C. § 1714(a) & (i) (1982), which seem to provide other means of "revocation" of withdrawals for routine administration of the public lands. *See* Opinion of Associate Solicitor, Scope of Withdrawal Review Provisions of FLPMA § 204(1) (Oct. 30, 1980). Further examination of the legislative history of FLPMA, including predecessor bills, indicates that Congress only intended that major terminations be sent to Congress. *See* H.R. Rep. 92-1306, 92d Cong., 2d Sess. 42-43 (1972). Perhaps because of its complicated and tenuous nature, the legislative history arguments have not been fully considered in *National Wildlife Federation*.

71. 43 U.S.C. §§ 331-1356 (1982).

72. *E.g.*, Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531(1987) (addressing standards for preliminary injunctions in NEPA and ANILCA suits); Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984) (addressing ESA standard of review and EIS content for staged review); North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980) (staged review under ESA).

73. Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985), *aff'd* 848 F.2d 1441 (9th Cir. 1988).

74. Conner v. Burford, 848 F.2d 1441, 1456-58 (9th Cir. 1988).

rate NEPA consideration of exploration and would have been a profitable victory for the government. A principle reason for rejecting application of offshore precedent is that the Minerals Management Service retains the authority to cancel leases for environmental reasons[75] and compensate the lessees by returning unrecovered payments up to the amount of the lessee's bonus and rental payments.[76]

C. *Summary*

The rights of claimants and lessees to develop minerals on the federal lands has been increasingly restricted by the discretion of federal land administrators. Those administrators are bound by numerous procedures which may serve as the bases of suits by groups or individuals unhappy with the substance of the agencies' decisions. The claimant or lessee is placed in a position of relying on the regularity of the decisions of federal land administrators to be assured of his property interest.

III. THE MERITS: DEFENDING AGENCY COMPLIANCE

The central issues in the environmental procedural suits are whether the agencies complied with required procedure. Accordingly, claimants and lessees are forced to evaluate the sufficiency of agency procedural compliance when they accept approval of a lease or mining plan of operations. If an environmental group alleges that an agency has failed to comply with mandated procedure, then claimants and lessees must defend the government. A few of the more troublesome points affecting the cases discussed in this paper are addressed below.

A. *Program or Regional Compliance Versus Project Compliance*

The type of procedural failure that is the most sweeping and hardest for the lessees and claimants to detect is a failure of programmatic or regional environmental compliance. Such failure may jeopardize the most regular appearing agency action.[77] For example, in *National Wildlife Federation*, the plaintiff argues that because the agency had no programmatic regulations[78] and no programmatic EIS,[79] hundreds of

75. 43 U.S.C. § 1334(a) (1982), 30 C.F.R. § 250.12 (1986). *See also* 2 LAW OF FEDERAL OIL AND GAS LEASES § 25.06[4] (1986) (discussing cancellation provisions for offshore leases). Another distinction between onshore and offshore situations is that an EIS is done at each stage of leasing, exploration, or development under OCSLA. At least one commentator thinks this may be a requirement of the Act. *See* D. MANDELKER, *supra* note 45, § 2:23 (arguing that an EIS is required). *See also* Secretary of the Interior v. California, 464 U.S. 312, 335-40 (1984) (describes OCSLA review stages).

76. 43 U.S.C. § 1334(a)(2)(c) (1982).

77. For general information on NEPA programmatic EIS requirements, see D. MANDELKER, *supra* note 45, § 9:02-08; Barney, *The Programmatic Environmental Impact Statement and the National Environmental Policy Act Regulations*, 16 LAND & WATER L. REV. 1 (1981). The Council on Environmental Quality regulations provide guidance for programmatic statements at 40 C.F.R. §§ 1502.4(b), 1508.18(b)(3) (1986).

78. Amended Complaint, Count V, National Wildlife Fed'n v. Burford, 676 F. Supp. 271, (D.D.C. 1985) (No. 85-2238), *preliminary injunction aff'd*, 835 F.2d 305 (D.C. Cir. 1987).

79. *Id.*, Count IV.

withdrawal revocations and classification terminations done by the BLM over a four and one-half year period were invalid. This was despite the fact that the important actions had site specific NEPA documentation and public participation.[80]

NEPA contains no specific programmatic or regional EIS requirements. The requirements merely serve as part of the review of a single action's cumulative impact. In *Kleppe v. Sierra Club*, the Supreme Court stated that project review which covered all of the relevant concerns would suffice, even if a required regional EIS had not been done.[81] In light of recent decisions, this principal has not been recognized, and mineral lessees or claimants should not rely on it.[82] A failure of programmatic rulemaking requirements of FLPMA may have a similar effect.[83]

B. *Scope of NEPA Consideration*

The courts have taken two approaches to the question of how much future development the agencies must consider in NEPA review of mineral exploration. First, for mining exploration[84] and oil and gas exploration in the Tenth Circuit,[85] the agency may restrict the scope of the action to the proposal itself and need not consider later stages such as development and production.

The argument that persuaded courts in the above situations was that subsequent stages of development are so speculative as to fall outside of the ambit of NEPA. For example, in the overthrust belt areas that were considered in the oil and gas leasing cases, lessees drill wildcat wells on only about twenty-five percent of the leases, and only about two

80. *See* Federal Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 12-41, *id.* (describes general compliance and gives detail for one area where the plaintiff alleged specific injury).

The two level nature of procedural compliance is dramatically illustrated by the Northland dredging case. Tulkisarmute Native Community v. Conquerwood, No. 85-604 CIV (D. Alaska). Environmental groups unsuccessfully challenged the NEPA compliance for a plan of operations of a remote Alaskan placer mining operation in an action before the Interior Board of Land Appeals ("IBLA"). Tulkisarmute Native Community Council, *et. al.*, 88 I.B.L.A. 210, GFS (Min) 125 (1985). They then appealed the IBLA decision to the federal district court. In the meantime, another environmental group challenged all approvals of placer mining in Alaska based on the failure of state-wide NEPA procedures to mandate an EIS. Sierra Club v. Penfold, 659 F. Supp. 965 (D. Alaska 1987). For a time, Northland was faced with the prospect of losing its right to operate in two different simultaneous court actions challenging compliance with the same statute.

81. Kleppe v. Sierra Club, 427 U.S. 390, 407 n.16, 414 n.26 (1976).

82. *E.g.*, *National Wildlife Federation*, *Sierra Club v. Penford*, and Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466 (9th Cir. 1986) (all involve allegations of programmatic failure without examination of site-specific compliance).

83. *See* Order of December 4, 1985, National Wildlife Fed'n v. Burford, 676 F. Supp. 271 (D.D.C. 1985) (No. 85-2238) (failure to make rules for public participation in management of public lands is basis for preliminary injunction).

84. Cabinet Mountains Wilderness v. Peterson, 510 F. Supp. 1186 (D.D.C. 1981), *aff'd*, 685 F.2d 678 (D.C. Cir. 1982).

85. Park County Resource Council v. United States Dept. of Agric., 817 F.2d 609, 622-24 (10th Cir. 1987).

to three percent of the leases are ever developed.[86] Odds of actual development are even less for mining leases.

In the second approach, adopted by the District of Columbia and Ninth Circuits for oil and gas leases, if the agency retains discretion to preclude significant impacts caused by later stages of development, then NEPA review need not consider these stages. An agency may retain discretion by use of stipulations, by regulatory provisions, or by statute. Conditional No Surface Occupancy ("CNSO") or contingent right stipulations may allow for preclusion of surface disturbing activity or for outright cancellation of a lease for environmental reasons.[87] *Conner* and *Sierra Club v. Peterson* specifically approved the use of CNSO stipulations to obviate the need for NEPA review of anything more than leasing at the lease issuance stage.[88] Offshore leasing cases already rely on this rationale to permit staged or tiered NEPA review since the regulations and OCSLA give the agency the authority to cancel leases for environmental reasons.[89] An EIS must be done before surface disturbing activities are allowed.[90]

This "early application" makes sense in theory, but as a practical matter, it would have little effect other than to increase paperwork. Surely, if pre-exploration decisions contemplate the environmental disturbance of full field development, then they must also contemplate the benefits of petroleum reserves; otherwise the decisions will be arbitrary and capricious. The value of such reserves would be a sound basis for the agency decision in all conceivable instances. Hence the full field EIS would be little more than an expensive formality, and one that was useless in the ninety-eight percent of leases that never produce.

This application of NEPA has another, potentially more significant, effect. In the past, multiple use mandates for public lands presumed that all land was open to mineral development unless the agencies had taken specific action to withdraw it.[91] Now, by application of NEPA process, including consideration of a "no action" alternative, the lands are effectively considered closed, and may be opened to exploration at the discretion of administrators.

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86. UNITED STATES FOREST SERVICE, OIL AND GAS GUIDE, NORTHERN REGION 16 (2d ed. 1981).

87. *See* Muys, Shepherd and Smith, *supra* note 19 (excellent general discussion of stipulations including CNSO stipulations); Edelson, *The Management of Oil and Gas Leasing on Federal Wilderness Lands*, 10 B.C. ENVTL. AFF. L. REV. 905, 940-50 (1983) (discusses CNSO stipulation and the district court ruling in *Sierra Club v. Peterson* prior to reversal by the court of appeals). Leases that originally contained a CNSO stipulation were not appealed by the Sierra Club, and consequently were not technically at issue. Sierra Club v. Peterson, 717 F.2d 1409, 1412 (D.C. Cir. 1983). The circuit court stated that an EIS or a binding stipulation was required to meet the requirements of NEPA. *Id.* at 1415. *See infra* notes 226-32 and accompanying text.

88. Conner v. Burford, 848 F.2d 1441, 1449-50 (9th Cir. 1988); Sierra Club v. Peterson, 717 F.2d 1409, 1415 (D.C. Cir. 1983).

89. *See supra* notes 71-75 and accompanying text.

90. *Conner*, 848 F.2d at 1446.

91. Mountain States Legal Found. v. Andrus, 499 F. Supp. 383, 397 (D. Wyo. 1980).

C. *Rulemaking and Public Participation under FLPMA and NFMA*

Both FLPMA and NFMA contain requirements for public participation. Section 309(e) of FLPMA[92] is the most confusing. If the merits of the *National Wildlife Federation* case are ever decided and the interpretation of the district court is upheld, then an administrator may have to solicit public comment, through regulation, on "execution" of the smallest of agency actions if the actions involve "management of public lands." Despite the fact that the important withdrawal revocations and classification terminations at issue in *National Wildlife Federation* were accompanied by public participation in the local area of the land action, the court was unaware of that public participation and enjoined the actions for failure of public participation.[93] Section 309 mandates public participation by procedures established in regulations, and there were no such regulations. Consequently, the court had no trouble in finding, without examination of specific BLM case files, that there was evidence of probable success on the merits sufficient to issue a preliminary injunction.[94] The court enjoined actions as diverse as removal of overlapping withdrawals within national parks and the opening of land to mineral entry.[95] Apparently, to the court, this is the type of programmatic failure which no amount of local compliance will cure.

Section 310 of FLPMA[96] states that "[t]he Secretary, with respect to the public lands, shall promulgate rules and regulations to carry out the purposes of this Act." Section 310 came into play in *National Wildlife Federation* when the plaintiffs argued that the BLM should have incorporated procedures for withdrawal review into regulations.[97] The alleged requirement was not at all apparent to the BLM. In 1978, the Legislative and Regulatory Management Division of BLM rejected draft regulations governing withdrawal review because they were instructions to the

92. In exercising his authorities under this Act, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for, and the management of, the public lands.

43 U.S.C. § 1739(e) (1982).

NFMA, 16 U.S.C. § 1612(a), contains slightly less encompassing public participation language which has yet to be at issue in any litigation.

93. *See* Federal Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 12-45, National Wildlife Fed'n v. Burford, 676 F. Supp. 271 (D.D.C. 1985) (No. 85-2238), *preliminary injunction aff'd*, 835 F.2d 305 (D.C. Cir. 1987) (describing public participation process generally and in the General Mountain Pass, Wyoming area).

94. Memorandum and Order Granting Preliminary Injunction December 4, 1985 at 17-18. *Id.* It should be noted that Judge Williams took strong exception to this finding in his dissent to the court of appeal's opinion upholding the preliminary injunction. 835 F.2d at 327. It is not inconceivable that the district court could have been swayed by this strong opinion.

95. Affidavit of Joseph Martyak, Exhibit to Federal Defendants' Motion for Stay [of order of Feb. 10, 1986] Pending Appeal, *id.*

96. 43 U.S.C. § 1740 (1982).

97. Amended Complaint, Count V, National Wildlife Fed'n v. Burford, 676 F. Supp. 271 (D.D.C. 1985) (No. 85-2238).

agency rather than the public, and thus belonged in the BLM Manual rather than the Code of Federal Regulations.[98] The courts have yet to decide the validity of this argument, but it is not entirely without merit since the BLM may reasonably intend some manual provisions to implement the purposes of FLPMA.

The strict interpretation of the rulemaking requirement advanced by the plaintiff in *National Wildlife Federation* is not in harmony with the general principals of administrative law or past court interpretations of FLPMA. Normally, there is no obligation that regulations duplicate, or unnecessarily elaborate, on standards expressed in statutes.[99] The *Sierra Club v. Watt* court's finding of a lack of necessity for rules to implement Section 603 of FLPMA is an example.[100] The problem will remain until the courts have settled the rulemaking and public participation requirements.

IV. PROCEDURAL DEFENSES OF MINERAL PROPERTY INTERESTS IN PUBLIC LANDS

If mineral lessees and claimants wish to protect their rights, then they must go beyond arguing the adequacy of the agency's compliance and take advantage of any procedural defenses. Often these are among the most effective ways to protect property in public policy suits. Lessees and claimants should not assume they will be necessary parties or be notified of pending litigation.[101] Furthermore, if they do not participate, then they may lose their rights without ever having those rights defended in court.

Where claimants' or lessees' property rights are at stake, a court will normally grant their petition for intervention.[102] In general, neither the government nor environmental groups will oppose intervention so long as the claimants or lessees petition to intervene prior to judgment.[103]

98. Affidavit 1B of Frank Edwards at 5, Accompanying Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, *id.* The draft proposed regulations interpreting FLPMA § 204(1), 43 U.S.C. § 1714(i) (1982).

99. 3 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 1510 (1985).

100. 608 F. Supp. 305, 330 (E.D. Cal. 1985). *See also* Sagebrush Rebellion v. Hodel, 790 F.2d 760 (9th Cir. 1986) (no insistence on strict formal FLPMA hearing procedures in designation of birds of prey conservation area). It is not inconceivable that there will be another standard for mineral extractors.

101. Lessees in *Connor* found out about the suit after judgment. In *National Wildlife Federation*, the plaintiff argued that Federal Register notice was inadequate notice to protect their interest, despite the fact that they read and commented regularly on Federal Register notices. Ironically, the court agreed and then ordered its preliminary injunction to be publicized through the Federal Register. In general, if a preliminary injunction is issued, then a claimant or lessee will be informed of the suit and injunction when they apply for any kind of permit or plan approval. Leases may be suspended. If there is no injunction then operations may be permitted and no notice given.

102. *See generally* 70 C. WRIGHT, A MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE §§ 1906-23 (2d ed. 1986).

103. There was no opposition to intervention by Mountain States Legal Foundation in *National Wildlife Federation* or *Sierra Club v. Watt*, or to Placid Oil Company when they acquired a lease in the area affected by the *Bob Marshall Alliance* suit. The plaintiffs in *Connor* did object to intervention by lessees and Mountain States. ASARCO, Inc. was denied in-

Once in the case, the claimants or lessees should take advantage of procedural defenses by emphasizing those points where the law specifically protects their interests.[104]

A. *Standing*

A defendant in any public policy environmental suit should first consider questioning the standing of the plaintiff to bring the suit. These suits approach the nature of generalized grievances that the standing requirement is supposed to keep out of the courts.

Article III of the Constitution limits the jurisdiction of the federal courts to "cases or controversies," and the courts have formulated a series of judicial tests to determine whether a plaintiff's grievance rises to the level necessary for standing.[105] The requirements are: (1) "injury in fact;"[106] (2) "fairly traceable causal connection between the claimed injury and the challenged conduct;"[107] (3) redressability of the injury by the relief sought;[108] and (4) the claim must fall into the "zone of interest" protected by the statute in question.[109] These requirements must be supported by more than mere allegations in the pleadings, and must be provable at trial.[110]

The high point of standing in environmental cases was *United States v. SCRAP*.[111] The Supreme Court allowed a group of law students to claim standing for an attenuated series of possibilities which the students argued would mean that an increase in rail freight rates would raise the prices students paid and thereby cause them injury.[112] Because *SCRAP* was decided on a motion for judgment on the pleadings, the Court did not question the seemingly far-fetched scenario. It did set

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tervention in *National Wildlife Federation* in July 1988. Apparently the court believed that the suit had progressed so far that ASARCO's application was untimely.

104. Those defenses will be different for each claimant or lessee depending on his situation. *See infra* notes 174-79 and accompanying text.

105. U.S. CONST. art. III, § 2. *See generally* 13 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE §§ 3531. to 3531.16 (2d ed. 1984). The Interior Board of Land Appeals will also apply a standing requirement. *See* Mark A. Altman, 983 I.B.L.A. 265, GFS (O&G) 95 (1986) (rejecting standing for generalized grievance).

106. "The injury alleged must be, for example, 'distinct and palpable,' Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (quoting Warth v. Seldin, 422 U.S. at 501), and not 'abstract' or 'conjectural' or 'hypothetical,' City of Los Angeles v. Lyons, 461 U.S. [95], [101] (1983); O'Shea v. Littleton, 414 U.S. 488, 494 (1974))." Allen v. Wright, 468 U.S. 737, 751 (1984). Injury in fact is also required to be personal injury. Purely associational injury in the situation, without an allegation of personal injury by an agency action, was rejected in *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972). Associational standing has almost crept back into the case law. *See* Animal Lovers Volunteer Ass'n, Inc. v. Weinberger, 765 F.2d 937 (9th Cir. 1985) (implying in dicta that a larger, better organized organization might have standing). Any such development would work to National Wildlife Federation's benefit, but would be unlikely to stand up to more thorough argument.

107. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 78-79 (1978).

108. Allen v. Wright, 468 U.S. 737, 751 (1984).

109. This requirement exists when a challenge is brought under a particular statute. Association of Data Processing Orgs. v. Camp, 397 U.S. 150, 153 (1970).

110. United States v. SCRAP, 412 U.S. 669, 688-89 (1973).

111. *Id.*

112. *Id.* at 678-80.

forth a process by which defendants in future cases could raise the issue of fallacious allegations of standing. The process included motion for more definite statement, discovery of standing facts, and motion for summary judgment if the facts contained in amended pleadings and discovery do not meet the requirements of the judicial test.[113]

Since judicial review under the APA is limited to review of "agency actions,"[114] each action should constitute a claim for which the plaintiff must independently plead and prove standing. Standing for one claim will not give standing for another.[115]

Single agency actions do not present a complicated standing problem. There is no question that the decision of an administrator to issue an oil and gas lease, as in *Bob Marshall Alliance*, is an "agency action" and a claim subject to challenge under APA. If that action injures a plaintiff, then there will be standing. The decision of Secretary Watt contested in *Sierra Club v. Watt*[116] seems to fall easily into the definition of an order, and is consequently a challengeable "agency action." Injury from this order could take place at many sites across the country.

In cases where the only line between different agency actions is the same or similar procedure or program, a more difficult problem, and a possible defense, is presented. If an agency takes two actions using the same deficient procedure, then will injury by one action give standing to challenge the other? For example, in *National Wildlife Federation*, if a procedurally deficient withdrawal revocation in Florida injures the plaintiff, does he have standing to challenge a withdrawal revocation in Alaska where he has never been?

The Supreme Court's recent standing case, *Allen v. Wright*,[117] addressed a situation analogous to the programmatic challenges in *National Wildlife Federation*. The Court denied standing to black parents who claimed that IRS procedures for granting tax exemptions to segregated private schools were deficient.[118] Although the Court characterized the alleged injury as serious, it rejected standing on the ground that the injury was not traceable to individual plaintiffs.[119] The Court further reasoned that because the injury depended on the actions of third parties and was otherwise speculative, the causation was too attenuated and the "fairly traceable" element was further weakened.[120] None of the plaintiffs could claim personal injury. The Court used analysis of considerations, such as separation of powers, that had formerly been pru-

113. *Id.* at 689 n.15.

114. 5 U.S.C. § 706(2)(A) (1982); 5 U.S.C. § 551(13) (1982).

115. *See, e.g.*, Hartigan v. Federal Home Loan Bank Bd., 746 F.2d 1300 (7th Cir. 1984) (standing must be proven for each claim); Ripon Soc'y v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975) (standing must be proven for each claim), *cert. denied*, 424 U.S. 933 (1976).

116. 608 F. Supp. 305, 311-13 (E.D. Cal. 1985).

117. 468 U.S. 737 (1984).

118. *Id.* at 741-45.

119. *Id.* at 753-56.

120. 468 U.S. 737, 758-59 (1984).

dential considerations, in interpreting the fairly traceable element.[121] The Court found that standing issues in challenges to agency programs are "rarely if ever appropriate for federal court adjudication."[122]

The analogy between *Allen* and *National Wildlife Federation* is particularly pronounced. In *National Wildlife Federation*, the plaintiff, on the basis of programmatic failure, asked the court to set aside virtually all agency actions revoking withdrawals or terminating classifications over the previous four and one-half year period. There were 814 specific agency actions listed in the complaint.[123] Because the various agencies involved intended many of the actions to enhance environmental values,[124] these actions would seem, as a matter of common sense, to fail the case or controversy requirement of article III.

Nevertheless, the court of appeals, in upholding the preliminary injunction, found that injury need not be shown for all 814 actions.[125] The court seemed to be relying on the programmatic challenge. Accordingly, the tough standard of *Allen* should apply.

In dismissing the *National Wildlife Federation* case for failure to prove standing, the district court did not find it necessary to apply the heightened standard for programmatic standing set forth in *Allen*. Instead, the district court relied on a recent analogous District of Columbia circuit case involving public land actions over huge areas of Alaska.

In *Wilderness Society v. Griles*,[126] the Court of Appeals of the District of Columbia set forth a standard to prove standing where an environmental plaintiff claims injury by the actions of third parties on public lands. The purpose of the test in *Wilderness Society* is to determine "whether the plaintiff's future conduct will occur at the same location as the [mineral developer's] response to the challenged government action."[127] It must show: (1) where the land subject to the challenged land actions are located; (2) that third parties will take actions on that land; and, (3) that the plaintiff or its members use that land and will thus be injured there.[128]

The district court found that the cursory "boilerplate"-like affidavits

121. *Id.* at 759-61. This development has been criticized as somehow making the concept of standing more irrational. *See* Nichol, *Abusing Standings: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985) (criticizing the addition of separation of powers doctrine to standing); Note, *Muddying the Unclear Waters of Standing*, 1985 B.Y.U. L. REV. 171 (1985) (court should not have used separation of powers to explain "fairly traceable" element). The criticism seems unjustified in environmental policy suits which, in many respects, may be more the province of Congress anyway.

122. Allen v. Wright, 468 U.S. 737, 759-60 (1984).

123. Exhibit A to Amended Complaint, National Wildlife Fed'n v. Burford, 676 F. Supp. 271 (D.D.C. 1985) (No. 85-2238), *preliminary injunction aff'd.* 835 F.2d 305 (D.C. Cir. 1987).

124. *See* Affidavit of Joseph Martyak, Exhibit to Federal Defendants' Motion for Stay [of order of Feb. 10, 1986] Pending Appeal, *id.*

125. National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987).

126. 824 F.2d 4 (D.C. Cir. 1987).

127. *Id.* at 12.

128. *National Wildlife Federation*, 835 F.2d at 329 (Williams, J., concurring and dissenting).

submitted by the Wildlife Federation were not adequate to meet the test of *Wilderness Society*.[129] The district court's dismissal on summary judgment was not a complete surprise since the court of appeals had found the Wildlife Federation's standing proof to be minimally sufficient to defend against a motion to dismiss where all presumptions are accorded the plaintiff.[130] The district court had also requested supplemental briefing on standing. The court of appeals later rejected the Wildlife Federation's requests for summary reversal and for reinstatement of the injunction pending appeal.[131]

While there is a slight possibility that the Wildlife Federation could prevail on appeal or refile the case with better standing proof, the momentum of this case has shifted to the government and the claimants and lessees. Even if the case is reinstated, the injunction will probably not be reimposed. As in *Wilderness Society*, standing proved to be an effective defense.

B. *Joinder*

Joinder is an example of a procedural defense that should specifically protect claimants and lessees. Several environmental procedural public land suits have addressed the issue of joinder of absent claimants or lessees under Rule 19 of the Federal Rules of Civil Procedure.[132] Nevertheless, this defense has been ineffective so far.

1. The Interest Protected by Rule 19

The first step in the joinder analysis is to determine whether the interest sought to be defended rises to a level that justifies protection under Rule 19. In *Sierra Club v. Watt*[133] and *Northern Alaska Environmental Center v. Hodel*,[134] the Sierra Club sued to set aside administrative decisions which set the standards by which the Department would approve mining plans of operation.[135] The suits did not challenge the standards themselves, but procedure used in making decisions that allowed application of the standards.[136] In each case, mining claimants argued that they were necessary parties under Rule 19 and, without their joinder, the court should dismiss the case.[137] The mining claimants contended

129. National Wildlife Federation v. Burford, No. 85-2238, slip op. at 9-13 (D.D.C. Nov. 4, 1988). One affidavit alleged that one Federation member used an area of 5,000,000 acres, while another alleged use of 2,000,000 acres. A third alleged "informational" injury for any public land action with allegedly deficient environmental documentation anywhere in the nation.

130. 835 F.2d at 313. *See supra* note 113 and accompanying text.

131. National Wildlife Fed, v. Burford, No. 88-5397 (D.C. Cir. Dec. 20, 1988) (order).

132. Those cases are *Sierra Club v. Watt*, *Conner*, *Northern Alaska Environmental Center*, *Sierra Club v. Penfold*, and *National Wildlife Federation*. *See generally* 7 C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure §§ 1601-24 (2d ed. 1986) (general reference on joinder).

133. 608 F. Supp. 305 (E.D. Cal. 1985).

134. 803 F.2d 466 (9th Cir. 1986).

135. 608 F. Supp. at 322.

136. 608 F. Supp. at 318, 321 n.27; 803 F.2d at 468-69.

137. 608 F. Supp. at 318; *see* 803 F.2d at 468-69.

that if the Sierra Club prevailed in having protection of wilderness values included in the standards, then they would be precluded from developing their properties.[138] The court agreed with the Sierra Club, and ignoring the property at stake, stated that a possible change in management standards was not an interest protected by Rule 19.[139] In *Northern Alaska Environmental Center*, the Ninth Circuit cited *Sierra Club v. Watt* to reach the same conclusion on the rights at stake in that case.[140]

In *National Wildlife Federation*, the District of Columbia Circuit further limited claimants' and lessees' rights under Rule 19. *National Wildlife Federation*, like *Sierra Club v. Watt*, involved hundreds or thousands of mining claimants and mineral lessees, many of them outside the jurisdiction of the court. The potential effect of *National Wildlife Federation* was much greater-the claimants could have lost their entire interest in the event of an adverse decision.[141] Still, the court of appeals found that claimants and lessees had only an expectancy, and no right to future government approvals necessary to develop their claim or leases; therefore, they had no right protected by Rule 19. While the decision seems to restrict this holding to issuance of a preliminary injunction, logical extension to other situations could emasculate any rights of claimants and lessees under the Mining Law and Mineral Leasing Act. The comparison of this holding with the *Conner* holding is ironic. In *Conner*, the court found that an EIS was required because the lessee had an absolute right to develop the lease.

Based on the cases decided thus far, a claimant or lessee could conclude that there is no private interest in public lands that rises to the level protected by Rule 19. Either these cases portend a significant change in mineral development on the public lands, or they will eventually be overruled as an excess of pro-environmental courts.

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138. Section 603 of FLPMA, 43 U.S.C. § 1782 (1982), is a substantive amendment of the General Mining Law. FLPMA § 302(b) 43 U.S.C. § 1732 (1982). The valid and existing rights protected under section 603 are only those rights actually being exercised as of the passage of FLPMA. FLPMA § 701(h), 43 U.S.C. § 1701 n.(h) (1982). If a claimant was not actually mining as of October 21, 1976, he had no right to establish an operation subsequently unless he met the stringent wilderness preservation standards. While the *Sierra Club v. Watt* court found a right to operate, this is not necessarily so for rights acquired after the passage of FLPMA. *See* Opinion of Solicitor Coldiron, 88 I.D. 909 (Oct. 5, 1981). *See also* Watson, *Mineral and Oil and Gas Development in Wilderness Areas and other Specially Managed Federal Lands in the United States*, 29 ROCKY MTN. MIN. L. INST. 37 (1983); Leshy, *Wilderness and Its Discontents—Wilderness Review Comes to the Public Lands*, 1981 AM. ST. L.J. 361 (argues for very restrictive or no mineral development under existing law); *see generally* 1 AMERICAN LAW OF MINING § 15.03[2][b][i] (2d ed. 1984). The Mining in the Parks Act, 16 U.S.C. §§ 1902-12 (1982), also supposedly protects valid and existing right, *see* 1 AMERICAN LAW OF MINING § 17.02[1] (2d ed. 1984), but a similar restrictive result for mining may be expected. *See* Novak, *Mining and the National Park System*, 2 J. ENERGY L. & POL'Y 165 (1982).

139. Sierra Club v. Watt, 608 F. Supp. 305, 322 (E.D. Cal. 1985).

140. Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466, 468-69 (9th Cir. 1986) (citing 3A J. MOORE, W. TAGGERT & J. WICKER, MOORE'S FEDERAL PRACTICE § 19.07[2.-0] (2d ed. 1985)).

141. *See infra* notes 216-25 and accompanying text.

3. The "Public Rights" Exception to Joinder

The Supreme Court, in *National Licorice Co. v. NLRB*,[142] recognized an exception to the necessity of joinder under Rule 19 where the plaintiff seeks to vindicate purely public rights. The Court held that individual employees were not necessary parties in an action by the NLRB against their employer, despite the fact that the action could affect the employer's ability to perform a contract.[143] In so holding, the Court amended the NLRB's order to state that the employees could still enforce any rights against the employer that the contract specified while, on the other hand, the employer could not enforce the contract against the employees.[144] Unlike Rule 19, the exception seems to apply without regard to the feasibility of joinder, though defendants could argue that Rule 19(b) had displaced the public rights exception and thus made feasibility of joinder a requirement.

The courts in *Sierra Club v. Watt*, and *Northern Alaska Environmental Center* determined that those cases met the requirements of *National Licorice* and held that the public rights exception was an alternative basis for their holding in each case. The *Connor* court apparently relied solely on *National Licorice* to find joinder of lessees unnecessary.[145] As the other courts have done, the Ninth Circuit described the interests of lessees as minimal and suggested that if the lessees ever did lose any of the legally protected interests, then they may have damage claims against the government.[146]

In each of the above cases, claimants' and lessees' arguments for dismissal on procedural points have forced the court to deny what had been perceived as a valid environmental claim. The reaction of courts has been to deny the property rights of claimants and lessees, rather than to deny the environmental claims. Claimants and lessees may do better if they avoid framing the joinder issues as an "either/or" proposition.

While defendants have advanced the joinder issue and public rights exception as determined on the merits, the most important impact of the exception may be on the limit it placed on the remedies available to plaintiffs who use it.[147] The Court in *National Licorice* specifically modified the order of the NLRB to delete the language that stated that employee contracts were void. *Connor* seems to recognize this principle, but negates its effect by assuming a suit for damages against the government is practical.[148] This is a mistake no lease purchaser would make. If the lessees had advanced a proposal on how the plaintiff's remedy should be limited, then the outcome may have been different.

142. 309 U.S. 350 (1940).
143. *Id.* at 366.
144. *Id.* at 364-65, 367.
145. Conner v. Burford, 848 F.2d 1441, 1458-62 (9th Cir. 1988).
146. 848 F.2d at 1461.
147. Remedies are discussed below. *See infra* notes 319-22 and accompanying text.
148. 848 F.2d at 1461.

C. *Exhaustion*

Normally, an individual affected by an agency action cannot appeal it to a federal court until the plaintiff has exhausted his or her administrative remedies.[149] Exhaustion of remedies simply means that where an agency action can be appealed within the agency, the individual must first go through the agency appeals process, thus exhausting his administrative remedies before the courts will hear the case. Because administrative appeals have relatively short limitation periods, regulations may preclude belated agency appeal if a court decides that exhaustion is necessary.[150]

Among the policies and considerations for application of the exhaustion doctrine set out by the Supreme Court in *McKart v. United States*, are: (1) whether a factual record, developed at the agency level, is important; (2) whether the agency action involves expertise or discretion; and (3) whether a lack of exhaustion affects administrative efficiency.[151] Exceptions to exhaustion include situations where administrative appeal would be futile, the outcome is predetermined, there is no notice of the administrative action, or the plaintiff's challenge is to the validity of a statute.[152] Because of the number of exceptions and the fact that lack of exhaustion does not affect jurisdiction, the ultimate decision whether to require exhaustion rests with the discretion of the court. At least one commentator has suggested that the courts will apply a "flexible balancing test" in determining whether exhaustion should apply in NEPA cases.[153]

In *National Wildlife Federation*, the plaintiff never attempted to become involved in the formal administrative process.[154] The court of appeals advanced several reasons for not requiring exhaustion. First, exhaustion was in the discretion of the trial court; second, exhaustion would be futile; third, claimants and lessees rather than the government had advance the defense; fourth, a factual record was unimportant to the court;[155] and fifth, by implication, exhaustion was for those who followed issues at the local level, not those who chose challenges on a national scale.[156]

The Tenth Circuit's holding in *Park County I*, that exhaustion was

149. McKart v. United States, 395 U.S. 185, 193-94 (1969). Secretarial actions and actions of the Chief of the Forest Service and the Interior Board of Land Appeals are final agency actions that are appealable to the courts. *See generally* B. SCHWARTZ, ADMINISTRATIVE LAW 502-19 (2d ed. 1984) (exhaustion and appealability).

150. *E.g.*, 42 C.F.R. § 4.411 (1986) (general appeals of BLM decisions must be made within 30 days).

151. 395 U.S. at 193-94.

152. B. SCHWARTZ, ADMINISTRATIVE LAW § 8.31 (2d ed. 1984). *See also* Ecology Center v. Coleman, 515 F.2d 860, 865 (5th Cir. 1975) (notice required).

153. D. MANDELKER, *supra* note 45, at § 4:22.

154. The plaintiff regularly commented on similar items noticed in the Federal Register.

155. Judge Williams, in his dissent, strongly disagreed. He viewed the relation between fact and law as critical. National Wildlife Fed'n v. Burford, 835 F.2d 305, 332 (D.C. Cir. 1987) (Williams, J., dissenting).

156. *Id.* at 316-18.

unnecessary, virtually eliminated any effective use of the doctrine in 10th Circuit NEPA cases.[157] The court found that although the plaintiff had chosen to delay, and thereby ignore the available agency process to correct NEPA deficiencies, exhaustion was inapplicable because the requirements of NEPA were not truly requirements of the agency. Instead, the Tenth Circuit reasoned that because NEPA's mandate is imposed from outside the agency, the courts are the appropriate forum for initiation of NEPA challenges.[158] The holding is especially strong because it found the district court had abused its discretion in applying the exhaustion doctrine in this case.[159]

While claimants' and lessees' recent experience with the exhaustion doctrine has not been favorable, the argument is not without force. There is no specific environmental exception to exhaustion, so those opposing environmental suits should advance the argument whenever possible. In the cases described in this paper, at least one judge has been persuaded,[160] and there is potential that others will accept the argument as well.

D. *Laches*

The equitable doctrine of laches will apply to bar a plaintiff's claim where lack of diligence by the plaintiff results in a detrimental reliance by the defendant. Generally, the courts will consider three factors: (1) the length of delay, (2) the diligence of the plaintiff, and (3) the detrimental reliance of the defendant. As with exhaustion and standing, there may be a relaxed application of the doctrine for environmental plaintiffs.[161] In NEPA cases, courts have often stated that the laches defense is not favored.[162] Nevertheless, it has, on occasion, been successfully argued.[163] The suits that are the subject of this paper contain laches arguments both as a defense on the merits and in application of a remedy.

National Wildlife Federation presents the best opportunity for use of laches as a defense on the merits.[164] The withdrawal review program had been in existence since 1956 and was mandated in FLPMA in

157. Park County Resources Council v. Department of Agric., 817 F.2d 609, 619-20 (10th Cir. 1987).

158. *Id.* at 620.

159. *Id.*

160. Judge Williams in *National Wildlife Fed'n v. Burford.* 835 F.2d 305, 332 (D.C.Cir. 1987) (Williams, J., dissenting).

161. Save our Wetlands v. United States Army Corps of Eng'rs, 549 F.2d 1021 (5th Cir. 1977). *See generally* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2946 (1973).

162. *See generally* D. MANDELKER, *supra* note 45, at §§ 4.26-4.28.

163. *See, e.g.*, Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1337 (10th Cir. 1982) (NEPA claim against Indian leases); Save Our Wetlands v. United States Army Corps of Eng'rs, 549 F.2d 1021 (5th Cir. 1977) (real estate development); Lathan v. Volpe, 455 F.2d 1111, 1122 (9th Cir. 1971) (highway).

164. Because laches was not argued until appeal of the injunction to the District of Columbia circuit court, that court declined to address the issue. 835 F.2d at 318.

1976.[165] The specific agency actions challenged in the suit were as much as four and one-half years old at the time the suit was filed.[166] All of the revocation actions were published in the Federal Register,[167] and there was evidence of actual notice.[168] During the four and one-half years, claimants and lessees have been acquiring interests in the affected land and spending money on exploration and development. The doctrine should present a strong argument for older revocations but may not apply to more recent ones.

The courts' bias against the use of laches in environmental suits was recently underscored in *Park County*. The Tenth Circuit held that the district court abused its discretion in holding that an environmental plaintiff's deliberate delay of nearly two years for tactical reasons while defendants expended a million dollars was grounds for laches.[169]

E. *Mootness*

The doctrine of mootness, as applied to environmental procedural suits, is similar to laches because it may depend on a plaintiff's lack of diligence.[170] Where facilities have already been completed, the courts have declared that the initial agency actions which allowed construction are moot. In *National Wildlife Federation*, *Conner*, and *Bob Marshall Alliance*, claimants and lessees argued that agency actions issuing leases, revoking withdrawals, and terminating classifications had already occurred, were not likely to be repeated, and consequently should be subject to the mootness doctrine. All of the cases cited to support this proposition are factually distinguishable from the public land cases because they deny relief for NEPA claims on completed facilities, as opposed to administrative actions.[171] In *National Wildlife Federation* it is possible that individual

165. FLPMA § 204(1), 43 U.S.C. § 1714(1) (1982). Withdrawal review was instituted by the BLM in 1956. It continued with greater and lesser effect through the time of the PLLRC. *See* 2 C. WHEATLEY, JR., STUDY OF WITHDRAWALS AND RESERVATIONS ON PUBLIC DOMAIN LANDS 420-25 (1969).

166. The National Wildlife Federation limited its challenge to those actions after January 1, 1981. Amended Complaint to page 16, National Wildlife Fed'n v. Burford, 676 F. Supp. 271 (D.D.C. 1985) (No. 85-2238), *preliminary injunction aff'd.* 835 F.2d 305 (D.C. Cir. 1987). Numerous revocations occurred prior to this date.

167. The complaint included a list. Amended Complaint Exhibit A, *id.*

168. *See* Affidavit 1A of Frank Edwards at 9-10, Accompanying Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, *id. See supra* note 100.

169. Park County Resources Council v. Department of Agric., 817 F.2d 609, 617 (10th Cir. 1987).

170. *See, e.g.*, Ogunquit Village Corp. v. Davis, 553 F.2d 243 (1st Cir. 1977). *See generally* D. MANDELKER, *supra* note 45, at § 4.25 (general discussion and listing of cases).

171. *See, e.g.*, Oregon Envtl. Council v. Kunzman, 714 F.2d 901, 903 (9th Cir. 1983) (spraying complete, but capable of repetition so mootness exception applies); Natural Resources Defense Council v. United States Nuclear Regulatory Comm'n, 606 F.2d 1261, 1272-73 (D.C. Cir. 1979); Ogunquit Village v. Davis, 553 F.2d 243 (1st Cir. 1977) (with stabilization of sand dune complete, NEPA does not require that "improvements" be removed). Mootness has operated to preclude NEPA and FLPMA claims in two recent but different suits. In TOSCO v. Hodel, 804 F.2d 590 (10th Cir. 1986), *ruling on motion for intervention from*, 611 F. Supp. 1130 (D. Colo. 1985), the State of Colorado and the National Wildlife Federation were precluded from bringing NEPA and FLPMA claims after settlement between the government and claimant. The arguments were reintroduced in Lamm v. Hodel, No. 87-F-190 (D. Colo. filed Feb. 4, 1987). In *Northern Alaska Envtl. Center v.*

claimants who had developed their properties prior to the suit could present a credible defense on this point.

F. *Statutes of Limitation*

The Mineral Leasing Act states that "[n]o action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within 90 days after the decision of the Secretary relating to such matter."[172]

Despite the apparent certainty of the statutory language, the Tenth Circuit held in *Park County* that the limitation did not apply to NEPA challenges. The court reasoned by analogy from a case applying a provision of the Marine Mammal Protection Act which limited judicial review of terms and conditions of permits issued under that act, but did not limit review of the actual issuance of the permit. The court simply ignored the far broader language of the Mineral Leasing Act provision and found it did not apply.[173] In light of the rule that NEPA does not repeal any other statute by implication, this ruling seems to be vulnerable.

If *Park County* is not followed, then *National Wildlife Federation* may also present an opportunity for application of the statute of limitations. Unless a revocation is void *ab initio*,[174] there should be no remedy against a lessee if a withdrawal revocation had been in place more than ninety days prior to the suit.

G. *Separate Consideration of Individual Claims*

From an equity and policy perspective, if the environmental procedure attendant to agency decisions underlying an individual mining claim or mineral lease meets the substantive goals of the statutes in question, then the title to that mineral property should be sound.[175] For example, an EA or an EIS may have adequately informed the decisionmaker for some purposes but not others. In the context of *Connor* and *Bob Marshall Alliance*, this could mean that leases on land without wilderness values, or those whose leases contained CNSO stipulations, may be more defensible.[176]

Hodel, 803 F.2d 466 at 469 (9th Cir. 1986), claimants' argument that NEPA compliance was adequate was mooted by agreement of the Park Service to do an EIS.

172. 30 U.S.C. § 226-2 (1982).

173. 817 F.2d at 616-18. In order for the *Park County* court to reach the NEPA issue of whether an EIS was required for lease issuance, it was necessary to find the laches, exhaustion, and statute of limitations issues adverse to the interests of the lessee. Ultimately the holding on the EIS issue was a victory for the Forest Service and the lessee.

174. If the revocation is void *ab initio* then the lease may be void *ab initio* as well. *See infra* notes 216-17 and accompanying text.

175. *See* Sagebrush Rebellion v. Hodel, 790 F.2d 760, 766-67 (9th Cir. 1986) (FLPMA procedures met by NEPA procedures); Friends of River v. FERC, 720 F.2d 93, 107 (D.C. Cir. 1983) (FERC licensing hearing takes the place of NEPA procedure).

176. This is of theoretical concern only since the court of appeals in *Conner* apparently described the whole of two national forests as "pristine wilderness." 836 F.2d 1521 (9th Cir. 1988).

Procedural defenses may apply differently to different claimants and lessees as well. For example, a lessee affected by the *National Wildlife Federation* suit may argue the Mineral Leasing Act statute of limitations bars a challenge.[177] Standing should apply independently to each revocation in *National Wildlife Federation*. Laches and mootness will apply differently depending on the amount of reliance.[178]

A geothermal lessee's intervention in *National Wildlife Federation* demonstrated the effectiveness of presenting individual claims. Intervenor California Energy stated several defenses to the plaintiff's arguments, but received no opposition.[179] Ultimately, the court ruled that the revocation in question was always open to geothermal leasing and consequently there could be no remedy against the lessee.[180]

Another way for a claimant or lessee to insure consideration of the specific merits of an individual claim would be to bring a collateral suit. Possible future continuation of *National Wildlife Federation* presents an opportunity for such a suit because of its nationwide scope and egregious facts. A claimant or lessee could challenge the authority of the BLM to enforce any injunction. Such a suit would undoubtedly face a venue challenge, and notions of judicial comity might force it back into the district court in Washington, D.C. In any case, exhaustion of administrative remedies, including IBLA appeal, could take as long as two years.

H. *Conclusions Concerning Procedural Defenses*

Despite the apparent power of procedural defenses, they will be of little avail unless claimants or lessees can convince a judge that the equities of the case support them. Often, dismissals or judgments based on these defenses are a way out of complicated or difficult cases, or an alternative to resolution of the merits where a case involves separation of

177. *See supra* notes 171-73 and accompanying text.

178. *See supra* notes 160-70 and accompanying text.

179. The response of the National Wildlife Federation was to claim that the injunction did not apply to the California Energy situation, and thus they effectively raised no opposition to release of the company from the injunction. This was despite potential surface disturbance from the development of geothermal resources. California Energy raised a standing defense in its answer. It might have been very difficult for the Wildlife Federation to prove injury since the geothermal site is on a military reservation that is closed to the public. There is no reason to believe that the National Wildlife Federation would not oppose release of an operation that was more accessible or more to their disliking. The court effectively released California Energy from the suit by holding that the area in question was always open to geothermal leasing. National Wildlife Fed'n v. Burford, No. 85-2238 (D.C.C. Dec. 31, 1987). If there was a full fledged defense in *National Wildlife Federation*, that is, one where all claimants or lessees actively pursued their interests as did California Energy, the plaintiff and court would find themselves reviewing hundreds of applications for relief from the suit. They would, in essence, take over some part of day-to-day administration of the public lands. At this point, the wisdom of Justice O'Connor's separation of powers and standing argument would become more readily apparent to the court. *See supra* note 120 and accompanying text.

180. *Id.* (order of Dec. 31, 1986).

powers problems.[181] As mentioned above, *National Wildlife Federation* was especially amenable for resolution on procedural bases, and a more persuasive presentation of the equities of that case may have been one reason behind the standing dismissal.[182]

V. After an Agency Loss: Is a Claimant's or Lessee's Interest Terminated?

Even if the agency decision which forms the basis of the claimants' or lessees' property interest is 'set aside,' an interest is still retained which can be restored with proper effort. To facilitate this restoration, participation and vigilance should not end upon the issuance of an adverse judgment.

A. *Remedies as Distinguished from Merits*

Where courts have dealt with the actual disposition of property interests affected by environmental procedural suits, they have done so without the aid of argument on what remedy is appropriate.[183] In some cases, consideration of property interests has been considered by district courts on remand.[184]

The Example of Remedies under NEPA

In NEPA cases, courts will normally remand to the agency with a mandatory injunction to re-do NEPA procedure so as to comply with the court's order.[185] Typically, the agency does not abandon a project or facility, but instead work is enjoined while an EIS, or a better EIS, is done.[186] Later, the project continues, assuming there is still political support after years of litigation. Where a court finds a NEPA violation, but the project is already completed, the case may be moot and no relief may be forthcoming.[187] In other situations the agency has proceeded with an EIS, or agreed to do an EIS, after the trial court's initial finding and the case has been determined moot while on appeal.[188]

Even where a court finds environmental or other procedures deficient, it may not require remand to the agency. If the defect is technical and further study would provide no useful information for the deci-

181. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 752, 758-61 (1984) (separation of powers as a basis of standing requirement).

182. It is the impression of some BLM employees that the justice department lawyers who initially defended the *National Wildlife Federation* suit did not present a vigorous defense on the merits. The attorneys were replaced and the defense improved, but perhaps too late.

183. *E.g.*, Conner v. Burford, 836 F.2d 1521 (9th Cir. 1988); Cady v. Morton, 527 F.2d 786, 798 (9th Cir. 1975).

184. *E.g.*, Sierra Club v. Peterson, 717 F.2d 1409, 1413-15 (D.C. Cir. 1983).

185. *See* D. Mandelker, *supra* note 45, at § 4:54 (scope of remedy).

186. This is the solution of the Ninth Circuit in *Conner*.

187. *See supra* notes 169-70 and accompanying text.

188. *E.g.*, Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466, 469 (9th Cir. 1986) (National Park Service agrees to do cumulative EIS, thus meeting contest on that point).

sionmaker, then there may be nothing for an agency to do.[189] Since especially thorough EAs may provide all of the useful information, the preclusion of a remedy opens the possibility of a "substantial compliance" argument.[190] A court has applied a similar sort of "substantial compliance" standard to hearing requirements under FLPMA.[191]

B. *Termination of Mineral Leases*

In *Sierra Club v. Peterson*,[192] an environmental group tried to invalidate oil and gas leases issued with inadequate NEPA compliance. In an earlier proceeding, the District of Columbia Circuit found NEPA compliance for a decision to issue oil and gas leases deficient because the Forest Service had issued leases with exploration rights and had not done an EIS. The circuit court stated that either a Conditional No Surface Occupancy ("CNSO") stipulation or an EIS could cure the problem and remanded the case to the district court.[193] On remand, the district court, on the motion of the lessees and the agency, inserted the CNSO stipulation into the leases. The district court rejected the Sierra Club's contention that the leases were void. The Ninth Circuit followed this remedy in *Conner*.

1. Contract Law as a Reason to Void Leases

Mineral leases are contracts between the federal government and lessees,[194] and both contract law and administrative law govern their execution.[195] On remand in *Peterson*, the Sierra Club presented arguments involving both contract law and administrative authority as reasons to void the leases.[196] Because the district court decided, without

189. *See, e.g.*, Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1026 (9th Cir. 1980) (study outside the formal ambit of NEPA supplants need for supplemental EIS); Friends of River v. FERC, 720 F.2d 93, 107-08 (D.C. Cir. 1983) (consideration of alternative at FERC licensing hearing obviates need for remand to supplement EIS).

190. This is to be distinguished from situations where environmental review has been done outside the requirements of NEPA by agencies charged with protecting the environment, *i.e.*, the Environmental Protection Agency. The courts have held that the procedure of these agencies is "fundamentally equivalent" to the NEPA process. *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 387 (D.C. Cir. 1973); Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 53 n.124 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1977). Functional equivalence will not apply to the Forest Service or BLM because their mandates include duties other than environmental protection. *See generally* D. MANDELKER, *supra* note 45, at § 5:15.'

191. *See* Sagebrush Rebellion v. Hodel, 790 F.2d 760, 766-67 (9th Cir. 1986).

192. Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983), *on remand*, Sierra Club v. Peterson, No. 81-1230 (D.D.C. April 11, 1984) (Order adding CNSO Stipulation), *enforcing*, 717 F.2d 1409 (D.C. Cir. 1983).

193. 717 F.2d at 1415.

194. Lynch v. United States, 292 U.S. 571, 580 (1934); Rosebud Coal Sales Co. v. Andrus, 667 F.2d 949, 951 (10th Cir. 1982); John Bloyce Castle, 81 I.B.L.A. 53, GFS (O&G) 129 (1984). *See generally* 1 LAW OF FEDERAL OIL & GAS LEASES §§ 14.19-14.21 (1987).

195. 2 LAW OF FEDERAL OIL & GAS LEASES § 21.01 (1987).

196. Motion of the Sierra Club for Order Declaring Void Certain Oil and Gas Leases Issued in the Palisades Further Planning Area and Cancelling Said Leases, Sierra Club v. Peterson, No. 81-1230 (D.D.C. April 11, 1984).

opinion, in favor of the lessees, we are left to infer what the basis of that decision might have been.

The primary argument advanced by the Sierra Club was that contracts made in violation of the law or public policy are void, and therefore contracts made in violation of NEPA are void. To support this proposition, they cited numerous cases outside of the NEPA context which seem to make that point.[197] The defendants responded by pointing out that, within the context of NEPA, there is no such consensus, nor perhaps any authority for this proposition at all.[198] They also pointed out that, outside of the NEPA context, the courts recognize many exceptions to the general rule advanced by the Sierra Club.[199]

The cases allowing contracts to remain effective despite NEPA violations are in themselves the strongest authority for the lessees. These include the refusal of courts to void coal leases in *Cady v. Morton*[200] and *Northern Cheyenne Tribe v. Hodel*[201] and the continued recognition of power contracts in *Forelaws on Board v. Johnson*[202] and *Port of Astoria v. Hodel*.[203] In the coal leasing cases, the courts ordered the agencies to reconsider lease issuance and enjoined new surface disturbing activity while the NEPA review was conducted.[204] The courts did not enjoin that work already underway.[205] The power cases involved no particular environmental disturbance, so the courts imposed no injunctions during the time the EIS's were being completed.[206] In *Astoria*, the plaintiff's

197. A listing of the cases relied on by the Sierra Club is as follows: Lachman v. Sperry-Sun Well Surveying Co., 457 F.2d 850, 852 (10th Cir. 1972); Northwest Airlines v. Alaska Airlines, 351 F.2d 253 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966); Ewert v. Bluejacket, 259 U.S. 129, 138 (1922); Waskey v. Hammer, 223 U.S. 85, 94 (1912); Connolly v. Union Sewer Pipe, 184 U.S. 540, 548 (1902); Jordan v. Axicom Systems, 351 F. Supp. 1134, 1135 (D.D.C. 1972), *aff'd*, 489 F.2d 1272 (D.C. Cir. 1974).

198. *See* Federal Defendants' Opposition to Sierra Club's Motion for Order Declaring Void Certain Oil and Gas Leases Issued in the Palisades Further Planning Area and Cancelling Said Leases, Sierra Club v. Peterson, No. 81-1230 (D.C.Cir. April 11, 1984), *enforcing*, 717 F.2d 1409 (D.C. Cir. 1983).

199. *See* Intervenors Maddox, *et al.*, reply to Motion of Sierra Club for Order Declaring Void Certain Oil and Gas Leases Issued in the Palisades Further Planning Area and Cancelling Said Leases, *id.* The defendants might also have argued that there is substantial doubt that the "transcendent rule" advanced by the Sierra Club even exists. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (1979) (giving considerations or whether enforcement of a contract is avoidable on public policy grounds). *See generally* A. FARNSWORTH, CONTRACTS § 5.5 (1984) (suggesting a court will look at legislative intent, policy considerations, and perhaps *malum prohibitum* and *malum in se*).

200. 527 F.2d 786, 798 (9th Cir. 1975).

201. No. CV 82-116-BLG-JFB (Oct. 6, 1986), *rev'd on other grounds*, 842 F.2d 224 (9th Cir. 1988).

202. 743 F.2d 677 (9th Cir. 1984), *cert. denied*, 478 U.S. 1004 (1986).

203. 595 F.2d 467 (9th Cir. 1979). *See also* National Wildlife Fed'n v. United States Forest Serv., No. 83-1153-SO (memorandum and order of July 2, 1985) (preliminary injunction reported at 592 F. Supp. 931 (D. Or. 1984)) (NEPA is no basis for declaring timber sales void *ab initio*); Sierra Club, *et. al.*, 92 I.B.L.A. 290, GFS (Misc) 33 (1986) (court will not void right-of-way grant for NEPA violations but will remand for additional stipulations).

204. Northern Cheyenne Tribe v. Hodel, No. CV 82-116-BLG-JFB, slip op. at 6-7, (4th Cir. Oct. 6, 1986).

205. *Id.* at 7; Cady v. Morton, 527 F.2d 786, 798 (9th Cir. 1975).

206. Forelaws on Board v. Johnson, 743 F.2d 677, 685-86 (9th Cir. 1984); Port of Astoria v. Hodel, 595 F.2d 467, 479-80 (9th Cir. 1979).

objection that if the court did not void the contracts, then the agency would do a "grudging *pro forma* compliance" with NEPA was overcome by continued court supervision.[207]

2. Lack of Administrative Authority as a Reason to Void Leases

In *Peterson*, the Sierra Club also advanced two arguments directed at the authority of the administrators to issue the leases. First, they argued that the law bound the Secretary to cancel leases issued without proper authority.[208] The authority for this proposition comes from cases interpreting the Mineral Leasing Act. Where the Secretary is, by statute, without power to issue a lease he must cancel it if challenged.[209] Cancellation for violation of the Mineral Leasing Act requires a positive act on the part of the Secretary, and the lease is not void *ab initio*.[210]

NEPA may be distinguished from the Mineral Leasing Act because a NEPA violation does not directly affect the Secretary's authority, but merely subjects his decision to the possibility of being set aside under the APA. The Secretary still retains discretion on how to comply with NEPA. Since the opinion of the circuit court had approved the use of a CNSO stipulation, it made sense for the district court to allow the agency to exercise its discretion and not constier the leases void *ab initio*. Assuming the lessees consent, there was no reason why the Secretary should not add the stipulations prior to taking the affirmative step of cancelling the leases.

Second, the Sierra Club argued that a rider to the Department of the Interior Appropriation Act[211] which prohibited expenditures for lease processing also prohibited addition of the stipulations.[212] Because the appropriation rider exempted leases that were already in existence, this argument requires some independent reason for the leases to be void. In the absence of such a reason, no restriction applies.

If the agency issued leases on improperly revoked withdrawals then the problem is more serious. The revocations could be void *ab initio* in which the case the agency must cancel the leases, though applications

207. *Port of Astoria*, 595 F.2d at 480.

208. Motion of the Sierra Club for Order Declaring Void Certain Oil and Gas Leases Issued in the Palisades Further Planning Area and Cancelling Said Leases at 5-6, Sierra Club v. Peterson, No. 81-1230 (D.D.C. April 11, 1984), *enforcing*, 717 F.2d 1409 (D.C. Cir. 1983).

209. *See* Boesche v. Udall, 373 U.S. 472, 476 (1963) (authority of Secretary to cancel improperly issued leases). *See, e.g.*, Navajo Tribe of Indians, 82 I.B.L.A. 387 GFS (O&G) 185 (1984) (lease mistakenly issued on Indian land cancelled); Robert Lyon, 78 I.B.L.A. 232 GFS (O&G) 54 (1984) (lease mistakenly issued in incorporated city limits cancelled); Estate of Glenn F. Coy, Resource Service Inc., 88 I.D. 236, 52 I.B.L.A. 182 GFS (O&G) 28 (1981) (application transferred improperly so lease cancelled) (cited by Sierra Club).

210. 1 LAW OF FEDERAL OIL & GAS LEASES § 14.19[1] (1987).

211. Act of October 20, 1983, Pub. L. No. 98-146 § 308, 97 Stat. 919 (similar prohibitions of spending to process lease application in further planning areas where included in later appropriations acts).

212. Motion of the Sierra Club for Order Declaring Void Certain Oil and Gas Leases Issued in the Palisades further Planning Area and Cancelling Said Leases at 13-15, Sierra Club v. Peterson, No. 81-1230 (D.D.C. April 11, 1984), *enforcing*, 717 F.2d 1409 (D.C. Cir. 1983).

may be able to keep their priority.[213] Because mining claims would suffer the same fate, the problem is discussed more thoroughly below.[214]

C. *Termination of Interests Acquired under the General Mining Law*

Although a valid mining claim confers substantial rights against the government, if claimants locate their claims on land closed to mineral entry, then they are void *ab initio*.[215] An agency loss on the merits in *National Wildlife Federation* might imply that the land was in fact legally closed to mineral entry, and the claims located on that land are void.[216]

1. Are Withdrawal Revocations Void *Ab Initio*?

If withdrawal revocations and classification terminations in *National Wildlife Federation* are void *ab initio*, then claims located on land closed to mineral entry may be void *ab initio* as well; but if the revocations are merely voidable, then the claims may have been located on land that was open to mineral entry, albeit only temporarily, and the claims would be valid. For the alleged NEPA violations, specifically the failure to conduct a programmatic EIS, there is no reason to believe that the rules for revocations would be different from the lease and contract precedent which do not mandate a void *ab initio* result.[217]

The FLPMA violations present a more difficult problem. Because the statute contains the authority of the agency the make revocations and terminations, violations of the act could destroy that authority. If the BLM must submit all withdrawal revocations to Congress, and must only do classification terminations after completion of Resource Management Plans, as argued by the plaintiff, then there may be no authority for the revocation and terminations. The revocations and terminations would be nullities.[218]

The Eighth Circuit addressed an analogous situation involving procedural violations of the Mineral Leasing Act in *Arkla Exploration Co. v. Texas Oil & Gas Corp.*[219] The government had failed to follow proper procedures involving a known geologic structure ("KGS") determina-

213. Leases issued on land closed to mineral leasing must be cancelled. *See* Navajo Tribe of Indians, 82 I.B.L.A. 387 GFS (O&G) 185 (1984) (lease mistakenly issued on Indian land cancelled); Robert Lyon, 78 I.B.L.A. 232 GFS (O&G) 54 (1984) (lease mistakenly issued in incorporated city limits cancelled); Estate of Glenn F. Coy, Resource Service Inc., 88 I.D. 236, 52 I.B.L.A. 182 GFS (O&G) 28 (1981) (application transferred improperly so lease cancelled) (cited by Sierra Club).

214. *See infra* notes 215-25 and accompanying text.

215. David W. Harper, 74 I.D. 141, 80-1967-20 (Mining) (1967). 30 U.S.C. § 26 (1982). *See generally* 2 AMERICAN LAW OF MINING § 35.11-2 (1986).

216. Lease could suffer a similar fate since cancellation is mandatory for leases issued by mistake on land closed to mineral leasing.

217. Contracts should only be voidable as opposed to void *ab initio*. *See supra* notes 193-206 and accompanying text.

218. *See* Federal Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 60-62, National Wildlife Fed'n v. Burford, 676 F. Supp. 271 (D.D.C. 1985), (No. 85-2238), *preliminary injunction aff'd*, 835 F.2d 305 (D.C. Cir. 1987).

219. 734 F.2d 347 (8th Cir.), *cert. denied*, 469 U.S. 1158 (1984).

tion.[220] The district court had declared that the noncompetitive oil and gas leases issued as a result of this determination were "invalid."[221] The violation of procedural aspects of the Mineral Leasing Act may have destroyed the authority to issue the leases.

Arkla may be distinguished from *National Wildlife Federation* because, after the loss, the lessee was in the same position as immediately before the suit—he had a lease application and priority.[222] In *National Wildlife Federation*, existing property rights which had been partially explored or developed may be voided. To date, the courts have given considerable deference to the agencies' interpretation of FLPMA and such a stringent interpretation would be a significant departure.[223]

The plaintiff in *National Wildlife Federation* argued that the suit would not invalidate existing claims and leases.[224] The court seemingly agreed[225] but, inconsistently, has enjoined operations on existing claims and leases.[226] Either the court is confused or there is a real threat to the property interest that is not being forthrightly discussed.

D. *Preservation and Restoration of the Mineral Property Interest*

Once it has been determined that the lease or claim is not truly void *ab initio*, lessees and claimants may take a number of steps to preserve their property interest. Further actions before the agency and the district court may be required.

1. Agency Obligation to Preserve Claimants' and Lessees' Rights

Where an added stipulation may cure a procedural defect, it may be necessary to determine if the agency has an obligation to proceed with the cure rather than cancel the lease.[227] Of course, the best and most efficient course is to work with the agency, as the lessees did in *Peterson*,

220. *Id.* at 357-61.

221. Arkla Exploration Co. v. Watt, 562 F. Supp. 1214, 1227 (W.D. Ark. 1983).

222. The suit was filed immediately after the issuance of the non-competitive leases. *Arkla*, 734 F.2d at 349-50. *See generally* Ekberg, *Federal Oil and Gas Leasing: Developments in Selected Problems and Issues*, 29 ROCKY MTN. MIN. L. INST. 589, 630-40 (1983) (discussing *Arkla* and KGS issues).

223. *See, e.g.*, Sagebrush Rebellion v. Hodel, 790 F.2d 760 (9th Cir. 1986) (substantial compliance and harmless error applied in agency actions under FLPMA); Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585, 599-600 (9th Cir. 1981) (agency interpretation of FLPMA given deference).

224. Answer of Respondent National Wildlife Federation to the Petition for Writ of Prohibition at 11, *In re* Mountain States Legal Found., No. 68-5353 (D.C. Cir.).

225. Opinion and order of December 4, 1985 at 3, National Wildlife Fed'n v. Burford, 676 F. Supp. 271, (D.D.C. 1985) (No. 85-2238), *aff'd*, 835 F.2d 305 (D.C.Cir. 1987).

226. Order of February 10, 1986, National Wildlife Federation v. Burford, 835 F.2d 305 (D.C. Cir. 1987).

227. The BLM may require lessees to accept post lease stipulations that are required by law. If lease stipulations may cure a defect as declared in court ruling that environmental procedures had not been followed, then these stipulations may be interpreted as required by law. In any case, the lessee will have the option of keeping the lease with the new stipulations or refusing it. *Cf.* Emery Energy, Inc., 67 I.B.L.A. 260, GFS (O&G) 252 (1982).

to effect a favorable outcome.[228]

To date, no agency has taken the position that they would cancel leases where they could cure the defects. Nevertheless, if an agency takes this position, then the lessee may find some support in precedent for cancellation on other grounds. Outside of the NEPA and FLPMA context considered here, the agency may not cancel a lease unless cancellation is mandated by statutes or regulations.[229] However, if lessees push this argument to the extreme, then there would be no reservation of agency discretion to reject the lease and there could be a conflict with cases which hold the exercise of this discretion to be permissible.[230] An agency may still not be able to assume discretion to cancel in the absence of a specific court order. If it did take this position, then the rules limiting the exercise of discretion in the first instance should restrict its actions. For example, the BLM may not refuse a lease application unless it has considered the use of stipulations to meet the concerns of the government,[231] and the record must support the conclusion that it is in the public interest to reject the lease application.[232] Consequently, the claimant should be able to argue that cancellation, rather than cure, is only reasonable in extreme cases.[233]

2. Are Agencies or Plaintiffs Estopped from Voiding Property Interests?

Because lessees and claimants have relied to their detriment on the actions of the agency and, in some cases the actions or inactions of the plaintiffs, they may be able to assert estoppel against a claim that leases or claims are void. Estoppel against the government has been recognized in the federal courts and is well established in the Ninth Circuit.[234] The necessary elements as set forth in *Georgia-Pacific Co. v. United States*[235] are:

> (1) The party to be estopped must know the facts; (2) the party to be estopped must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the party seeking to estop the latter must be ignorant of the facts; and (4) the party seeking to estop must rely on the former's conduct to his injury.[236]

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228. The Forest Service and the lessees agreed on the insertion of the CNSO stipulation as presented and both argued the same points before the district court on remand. *See supra* notes 191-92 and accompanying text.

229. John Bloyce Castle, 81 I.B.L.A. 53, GFS (O&G) 129 (1984); Beverly M. Harris, Aminoil, 78 I.B.L.A. 251, GFS (O&G) 57 (1984).

230. *See* Cady v. Morton, 527 F.2d 786, 798 (9th Cir. 1975) (preserving lease but reserving discretion on reconsideration of issuance).

231. Robert G. Lynn, 76 I.B.L.A. 383 (1983) GFS (O&G) 10 (1984); Western Interstate Energy Co., 71 I.B.L.A. 19, GFS (O&G) 94 (1983).

232. Eagle Exploration Co., 69 I.B.L.A. 96 (1982) GFS (O&G) 12 (1983).

233. *See* Horace H. Alvord IV, 80 I.B.L.A. 49 GFS (O&G) 97 (1984).

234. *See generally* Parcel, *Making the Government Fight Fairly: Estopping the United States*, 27 ROCKY MTN. MIN. L. INST. 41 (1982).

235. 421 F.2d 92 (9th Cir. 1970).

236. *Id.* at 96.

The Ninth Circuit has broadened the requirement of knowledge on the part of the government to include situations where an agency knew or should have known the facts.[237] The courts will apply a balancing test to determine if the interests of the United States outweigh those of the private party. If they do not, then a court may allow estoppel.[238]

National Wildlife Federation seems to meet all of the *Georgia-Pacific* criteria. If the BLM loses on the merits in *National Wildlife Federation*, then it will be apparent that they should have known the proper procedures for revoking withdrawals and terminating classification. On the other hand, it does not seem reasonable to expect a claimant or lessee relying on the agency's regular and proper functioning to know of the procedural errors. The agency's posting of Federal Register notices opening the land to mineral entry clearly anticipated and invited reliance by claimants.[239]

In cases such as *Conner*,[240] where the lessees were never notified of the suit or served with a notice of *lis pendens*,[241] lessees could argue that the plaintiffs are estopped from claiming that their leases are void. Not only did the lessees rely on the indirect representation of the government that their title was good,[242] but they could also argue that they relied on the duty of the plaintiffs to file a notice of *lis pendens*, seek a stay or an injunction, or otherwise notify them of the suit if plaintiff's claim of the property interest was invalid. An environmental group filed a notice of *lis pendens* in one other recent NEPA case where the title to property was in question,[243] and there seems to be no impediment to such a filing in *Conner*. If the plaintiffs are to be estopped from claiming the leases are void in *Conner*, then they must have intended that the defendants rely on their actions or inactions. Since this is unlikely, the reliance elements will have to come from a duty under the *lis pendens* statutes or other law.

3. Laches, Mootness, and Joinder as Limits on Plaintiff's Remedies

Even if the equitable defenses of laches and mootness are not strong enough to bar the plaintiff's claims against the government, they

237. United States v. Wharton, 514 F.2d 406, 412 (9th Cir. 1975).

238. Union Oil Co. v. Morton, 512 F.2d 743, 748 n.2 (9th Cir. 1975). *See* Parcel, *supra* note 233, at 48-52. a proprietary-sovereign function distinction may enter into the analysis of estoppel problems as well. Leases and environmental protection seem to fall into both categories. *See id.* at 46-48.

239. The notices typically stated where and how much land would be open to mineral entry. Specific provisions, such as time of opening, were provided in anticipation of competing interests locating or filing on newly opened land.

240. The court of appeals decision in *Conner* avoids the cancellation problem by creating no surface occupancy leases. Conner v. Burford, 848 F.2d 1441, 1449-50 (9th Cir. 1988).

241. 28 U.S.C. § 1964 (1982).

242. The Forest Service continued to issue permits for seismic exploration in the Flathead and Gallatin National Forests while the suit was pending. Signal of Montana and Geodata, Inc. invested several tens of millions of dollars in seismic work which they sold to lessees.

243. *See* City of Angoon v. Hodel, 803 F.2d 1016, 1018 (9th Cir. 1986) (Sierra Club files notice of *lis pendens* in Alaska).

may still be strong enough to limit any injunctive remedy, especially as it affects claimants or lessees. Because such relief is equitable, the court should consider these other equitable concepts.

If necessary parties are not joined, Rule 19(b) mandates that the court consider limiting the scope of relief to avoid injuring absent parties.[244] Since the court exercises discretion over any relief, those asserting the interests of absent claimants and lessees should present a strong argument that the court tailor the relief to preserve their interests.[245] If a court applies the "public rights" exception to joinder, even in the alternative, then the allowed remedy should not alter the rights of claimants or lessees.[246] To enforce this proposition and get an agency to issue permits, it may be necessary to prevail in a collateral suit.[247] Such a suit would be extremely difficult to win but would force the courts to face an inherent contradiction in the use of this doctrine if they enjoin third party rights.

4. Suspension of Leases

When an agency loses a procedural suit, a lessee will want to preserve the term of the lease and save on rental payments by accepting suspension of the lease during appeal or compliance with environmental procedural statutes.[248] An injunction may cause the agency to initiate steps to suspend a lease. In theory, suspension will not preclude seismic or other surface geological or geophysical exploration, but it will preclude issuance of an APD.[249]

If the lessee initiates suspension, then the agency may take the opportunity to add onerous stipulations as a condition of suspension.[250] While it is possible that such stipulations could be favorable to the government's case, they may not be agreeable to the operator's needs and perception of the case. It may be possible for a lessee to simply turn down a requested suspension once it is offered with the onerous stipulations.[251]

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244. *See supra* notes 129-46 and accompanying text.

245. *See supra* notes 182-91 and accompanying text.

246. The specific issue of limitation or relief when the "public rights" exception to joinder is applied is discussed above. *See supra* notes 138-46 and accompanying text.

247. There was no specific injunction in *Conner*, *see* 605 F. Supp. 107, 109 (D. Mont. 1985), but there was in *National Wildlife Federation*. *See* Order of Feb. 10, 1986, 676 F. Supp. 271 (D.D.C. 1985) (No. 85-2238), *aff'd* 835 F.2d 305 (D.C. Cir. 1987). *See also supra* notes 176-79 and accompanying text (mentioning collateral suits).

248. 30 U.S.C. § 209 (1982) authorizes suspension for "conservation purposes." This has been held to include conservation in the environmental sense as well as conservation of oil and gas. Copper Valley Machine Works v. Andrus, 653 F.2d 595, 600 (D.C. Cir. 1981). Regulations at 43 C.F.C. § 3103.4-2 (1986) interpret the statute. *See generally* Peterson, Extensions and Suspensions of Federal Oil and Gas Leases, Paper 12, pp. 12-19 to 12-34, Overthrust Belt-Oil and Gas Legal and Land Issues (Rocky Mtn. Min. L. Fed'n 1980).

249. Drilling is a lease activity. 43 C.F.R. pt. 3160 (1986).

250. *See* Getty Oil Co. v. Clark, 614 F. Supp. 904, 915 (D. Wyo. 1985) (stipulation added to give authority to deny later activity), *aff'g*, Sierra Club, *et al.*, 80 I.B.L.A. 251, 260 GFS (O&G) 119 (1984) (includes text of stipulation).

251. If the lease term is near its end, as it was in *Getty*, then this may not be an option.

If a preliminary injunction denies access to a lease, then the Mineral Leasing Act and the regulations recognize a mandatory suspension of lease payments and the lease term despite any lack of paperwork by the agency.[252] In this situation, a lessee may retroactively recover the payments and any lost lease term.[253] Unfortunately, the problem of retroactive recoupment of rentals and term is more difficult where there is no preliminary injunction and the lessee instigates the suspension proceedings. To date, the BLM has taken the position that it may only grant suspensions as of the date of application.[254] However, if the court's order is retroactive and the leases are void, then contract principals should allow recovery.

5. Motion for Clarification or Amended Judgment

During the litigation of the merits, the parties may ignore or give little consideration to arguments on the nature of the relief that the court should grant if the environmental groups win.[255] As a result, the plaintiff's relief may be harsher than necessary and lessees or claimants will want to move for amended judgment or clarification[256] to include interim remedies, such as lease suspension, that may lessen the impact. This is especially true if a court has declared leases or claims void. In *Northern Cheyenne Tribe v. Hodel*, a Montana federal district court's initial relief was to cancel several coal leases. On a motion to amend the judgment, the court, citing *Cady v. Morton*,[257] changed its decision and suspended most of the leases pending NEPA compliance but allowed operations to continue on those leases adjacent to existing operations.[258]

6. Congressional Restoration

Because of the incredibly broad scope of the *National Wildlife Federation* preliminary injunction, and the apparent complexity of the problems, some of those affected have gone to Congress to get relief. The 99th Congress passed several bills exempting specific actions or areas from the suit.[259] All of the congressionally exempted land actions were for activities other than mineral development. Still, it is not incon-

252. *See* Copper Valley Mach. Works v. Andrus, 653 F.2d 595, 603 (D.C. Cir. 1981) (mandatory suspension during time when lessee is denied access).

253. 43 C.F.R. § 3101.4-2(c) (1986). *Copper Valley Machine*, 653 F.2d at 603.

254. Paul Kohlman, a party and lessee in *Bob Marshall Alliance*, was denied retroactive repayment of rentals.

255. *E.g.*, Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988) (relief as it effects claimants not considered); Bob Marshall Alliance v. Watt, No. CV-82-015-GF (D. Mont. May 27, 1986) (relief as it effects lessees not considered until supplemental briefing after *Conner* decision and then not mentioned in court's opinion).

256. FED. R. CIV. P. 59(e).

257. 527 F.2d 786, 798 (9th Cir. 1975).

258. Northern Cheyenne Tribe v. Hodel, No. CV 82-116-BLG-JFB, slip op. at 506 (Oct. 6, 1986) (amending order of May 28, 1985), *rev'd on other grounds*, 842 F.2d 224 (4th Cir. 1988).

259. Pub. L. No. 99-542 (1986); Pub. L. No. 99-590 (1986); Pub. L. No. 99-606 (1986); Pub. L. No. 99-632 (1986).

ceivable that a mineral development that had the support of a local community could receive similar treatment, with proper political effort.

VI. CONCLUSION

The procedures Congress has developed to govern the administration of the public lands unquestionably serve important public policy objectives. Environmental studies, public participation, and expression of administrative standards in regulations result in informed decision-making which benefits both mineral developers and environmental groups. Yet, when the procedures become the means to throw federal land management into turmoil and cause the waste of millions of resource exploration dollars, the cost greatly outweighs the benefit. Beyond the waste of dollars, our nation will be less likely to develop valuable public resources because of title uncertainties.

The courts have neither challenged the authority of the administrators to make the land management decisions in *Connor v. Burford*, *Bob Marshall Alliance v. Watt*, *National Wildlife Federation v. Burford* and *Sierra Club v. Watt*, nor challenged the good faith of any parties involved. The courts have simply held that the agencies made the decisions with the wrong procedure. Yet, the agencies' decisions have been set aside at great cost or risk to third party mining claimants and mineral lessees. It seems that the process has overcome the substance of the decisions.

Claimants and lessees can protect themselves by working with the administrative agencies. Under the current state of the law, to avoid major environmental review of leasing or exploration, mineral lessees may have to allow the agencies to reserve discretion to terminate their projects for environmental concerns. This undoubtedly holds some risk, but from a business perspective, that risk is much less than the risk of not finding a valuable mineral deposit. To date, while the agencies have insisted on environmental mitigation, they have not used restrictive lease stipulations to stop projects.

In many respects the environmental suits discussed in this paper act as a monkey wrench thrown into the public lands administrative machinery. The National Wildlife Federation has stopped the machinery with its suit, halting more conservation projects than any group of developers could ever hope to stop. The courts can end this kind of obstruction by giving deference to administrative decisions on what procedure is required, and by applying doctrines such as laches, mootness, standing, exhaustion, joinder and the statute of limitations. In the pending actions, the courts have the opportunity to use these doctrines and place the administration of the public lands back in the hands of the agencies, where Congress always intended it to be. Congress should not have to pass special legislation to facilitate minor land management decisions.

While the suits may affect federal administrative decision process, their effect on the property interests of third parties is not at all certain. The remedies accorded plaintiffs in these suits may not invalidate the rights of claimants or lessees. If they appear to do so, then they may be

beyond the power of the courts, especially if all of the leases and claimants are not joined. But the holders of mineral interests cannot count on the courts deciding in their favor if they are absent. Individual claimants and lessees have to go into court and specifically argue why their interests are not valid. If and when they do so, their chances of success are good.

FELONY PLEA BARGAINING IN SIX COLORADO JUDICIAL DISTRICTS: A LIMITED INQUIRY INTO THE NATURE OF THE PROCESS

THOMAS A. GOLDSMITH*

"No, no!" said the Queen. "Sentence first—verdict afterwards."[1]

"Breaking rocks in the hot, hot sun. I fought the law and the law won."[2]

"Brought up to believe that the soul of the American justice system is based on the determination of truth, and the protection of the individual, many feel betrayed by the plea bargaining system."[3]

I. INTRODUCTION

Most felony cases are resolved by a plea of guilty: Not necessarily a plea to the crime actually charged, but rather an induced negotiated plea to a charge that may, in some instances, be less serious than the crime that was actually committed.[4] Although plea bargaining[5] has been consistently endorsed by the United States Supreme Court,[6] much of the relevant literature implies that this practice is a pathological deviation

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This article is in partial fulfillment of the requirements for the Master of Judicial Studies degree program at the University of Nevada-Reno, in cooperation with the National Judicial College.

The author thanks the clerks and court administrators who helped him gather information from their files, the judges and lawyers who patiently answered his many questions, and the individuals whose criticism and assistance helped make this a better article, including: Professors Malcolm Feeley, James Richardson, James Berry and Pat Sterling; Judges Charles McGee (Nevada), Jerry Lincoln, John Kuenhold, Charles Buss and Joseph Bellipanni; and, research associate Marlene Thornton of the National Center for State Courts.

1. L. CARROLL, ALICES'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS 122 (1966).

2. Sonny Curtis (1966).

3. Note, *Plea Bargaining: The New Hampshire "Ban"*, 9 NEW ENG. J. CRIM. & CIV. CONFINEMENT 387, 396 (1983).

4. Davis, Griffiths and Napoleon, *Bargain-Basement Justice: Judicial Responsibility for the Plea Bargaining System*, 25 N.Y.U. L. REV. 319, 321 (1979).

5. In this article, the term "plea bargaining" will be used to mean any process by which inducements are offered in exchange for any concession of criminal liability. This broad definition which was borrowed from Weninger's, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265 (1987), has been used because techniques such as deferred judgments and dismissals with restitution, which do not always produce formal determinations of guilt, were frequently observed.

6. Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978); Blackledge v. Perry, 417 U.S. 21, 29 (1974); Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973); Santobello v. New York, 404 U.S. 257, 260 (1971).

from a proper course of events in the criminal justice system.[7]

Critics of plea bargaining often charge that its rise in popularity represents the triumph of administrative and organizational interests over justice. Collectively opponents believe that it commercializes a normative process, perverts the attorney-client relationship, diminishes the role of judges, and undercuts important legal doctrines. Furthermore, opponents feel that it promotes laziness, incompetence, and favoritism by personal influence. Finally, adversaries allege that it encourages unwarranted leniency toward the guilty and conviction of the innocent, and merges the tasks of adjudication and sentencing, thus allowing the public to think that the guilty are getting away with something.[8]

Plea bargaining does, however, have its supporters.[9] In a study of six Colorado judicial districts,[10] fifty per-cent of the judges and a majority of the lawyers interviewed believed that plea bargaining serves a useful purpose when responsible people are involved.[11] Some of those interviewed commented that it can individualize justice and produce more consistent results. Others commented that in the presence of overcharging, a plea bargain can produce conviction for crimes actually committed, and thereby produce appropriate sentences. Yet even those judges and lawyers who supported it, expressed concern. As one judge put it, "in the hands of the skilled it's a surgeon's scalpel. But in the hands of the unskilled it's a butcher knife."

The purpose of this article is to present both surveyed and empirical information of felony plea bargaining practice in Colorado. This article will present the findings of a survey conducted of six Colorado judicial districts.[12] The opinions of both judges and lawyers from each of these districts address the growing concern over the Colorado plea bargaining process. It is the author's hope that this article will encourage further investigation of the Colorado plea bargaining process, and the development of guidelines for a uniform plea bargaining system.

II. CONTRASTED VIEWS OF THE COLORADO LEGAL PROFESSION

Most of the judges interviewed felt that plea bargaining was forced upon them. Yet, many felt that less bargaining was possible and that they could agree to changes in current trial procedures if such changes would reduce the overall occurrence of plea bargaining. Furthermore, many felt that certain aspects of plea bargaining such as sentencing con-

7. Feeley, *Perspectives on Plea Bargaining*, 13 LAW & SOC'Y REV. 199, 201 (1979).

8. *See, e.g.*, Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 934 (1983). Many of the judges interviewed in this study agreed. *See infra* Appendices A and B.

9. *See* Alschuler, *supra* note 8, at 934.

10. *See infra* notes 53-58 and accompanying text.

11. The 27 judges whose cases were examined in this study were interviewed, as were the six district attorneys, and the six lead public defenders in the districts studied.

12. *See infra* Appendices A and B.

cessions should be eliminated. Finally, some expressed concern that plea bargaining had taken them "out of the game," and many of those who felt that they were still in the game were unclear about the proper extent of their participation in the regulation of plea bargaining.

Generally, the lawyers interviewed like plea bargaining. Many believe that it works because it aids in producing justice in an overworked system. Furthermore, lawyers were not particularly concerned that rights may be lost in the process because the rights at risk are not that valuable in practice. The lawyers interviewed think plea bargaining reflects the desire of many Americans for a deal, and that it will continue to be utilized because of economic necessity, human nature, local politics, and a perceived need for intangible justice. Nevertheless, the lawyers also expressed concern that the process may distort the traditional lawyer-client relationship.

A number of the judges and lawyers interviewed did not agree that plea bargaining responds to existing problems. These judges and lawyers believe that it can produce or maintain some of the abuses it is designed to correct. One question they raised was: Do prosecutors overcharge because of plea bargaining or does plea bargaining exist, in part, because of overcharging?

Some legal scholars feel that bargaining for justice is inappropriate and view it with distaste.[13] A leading critic of plea bargaining, former University of Colorado Law Professor Albert Alschuler, suggests that plea bargaining may be distasteful to the public because it implies that defendants are only half-guilty, which is a concept that most people with a moralistic view of punishment find difficult to accept. To Alschuler, if the criminal process works at all, it may be because it reinforces concepts of moral responsibility and moral guilt that cannot be properly compromised.[14] Nevertheless, the inevitability of plea bargaining is now generally accepted,[15] and many Colorado judges, district attorneys, and lead public defenders that were interviewed agreed with this conclusion.[16] The current trend, therefore, is for control, not abolition.[17]

Clearly, plea bargaining would not exist if advantage could not be derived from it. One of the rationales given for its widespread use is that it allows justice to be done. In a recent article discussing its use, it was said that, "[m]andatory sentencing laws [have] induce[d] wholesale circumvention and manipulation by judges, prosecutors and defense

13. M. HEUMANN, PLEA BARGAINING 156, n.11 (1978); J. BOND, PLEA BARGAINING AND GUILTY PLEAS 130 (1982).

14. *See* Alschuler, *supra* note 8.

15. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J 338 (1982); *but see* Schulhofer, *Is Plea Bargaining Inevitable?* 97 HARV. L. REV. 1037 (1984) (arguing that it is not inevitable).

16. *See infra* Appendices A and B.

17. Parnas & Atkins, *Abolishing Plea Bargaining: A Proposal*, 14 CRIM. L. BULL. 101 (1978). In 1973, the National Advisory Commission on Criminal Justice Standards and Goals proposed complete abolition of plea bargaining by 1978.

counsel determined to prevent injustice in individual cases . . . ."[18]

III. QUESTIONS TO BE ANSWERED: WHERE DO WE GO FROM HERE?

What are the advantages to negotiating a plea as opposed to going to trial? What drives plea bargaining? These questions have been asked and answered often without producing any meaningful change.[19] Therefore, it might be more useful to begin addressing questions such as: Does the operation of the system by which felony cases are resolved conform to the justice system's formal specifications? Does plea bargaining, as practiced, comply with basic notions of how a just judicial system ought to work? Are there differences between doctrine and practice?[20]

Similar to other state legislatures, the Colorado General Assembly maintains an expensive and elaborate jury-trial system through which felony cases may be regularly resolved. However, that jury-trial system is rarely used.[21] Instead, most felony cases are resolved through plea bargaining, a system that the General Assembly also maintains.[22] Therefore, since plea bargaining is the real felony resolution system, it should be studied thoroughly to make it as effective as possible.

The Colorado General Assembly has mandated long prison sentences in many cases, yet it also compels mitigation of sentences by withholding the funds necessary to carry them out.[23] Perhaps then, as has been suggested, it may be necessary to subvert the system to make room in prisons for new offenders.[24] Similarly, if Colorado is unwilling to provide the funds necessary to make jury trials effectively available to all defendants, then plea bargaining and its discretion may be the only way to resolve the many pending felony cases.

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18. Morris & Tonry, *Presiding in Criminal Court: An Introduction*, 72 JUDICATURE 7, 10 (1988).

19. *See* J. BOND, PLEA BARGAINING AND GUILTY PLEAS (1982).

20. The notion that a legal system may operate in a manner significantly different from its formally stated specifications can be traced back to a single, seminal article written by the influential Roscoe Pound in 1910. Pound, *Law in Books and Law in Action*, 44 AM. U.L. REV. 12 (1910). Two years later he expanded on this notion saying that "the life of the law is in its enforcement," and he advocated the study of the workings of the law so that it could be made most effective. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 514 (1912). Pound's call for empirical research not only influenced his own generation, but also future generations including our own. *See, e.g.*, the June/July 1988 symposium issue of JUDICATURE, vol. 72, on policy-relevant research.

21. *See infra* notes 46-63 and accompanying text.

22. COLO. REV. STAT. § 16-7-301 (1986).

23. It has been suggested that the public demands long prison sentences because it does not support probation:

> In an era . . . in which many public officials believe that the public demands greater certainty and severity in the imposition of punishments, . . . new intermediate sanctions must be more intrusive and punitive than nominal probation if they are to be credible. In other words, pressures now exist that call for development of new non-incarcerative sanctions that are less punitive than imprisonment and more punitive than probation.

See Morris & Tonry, *supra* note 18, at 9.

24. Krislov, *Debating on Bargaining: Comments from a Synthesizer*, 13 LAW & SOC'Y REV. 573 (1979).

What guides the exercise of the discretion inherent in plea bargaining? Is it exercised in a consistent, equal and uniform manner? Is it subject to meaningful regulation? Does it conform to basic notions of how a just judicial system ought to operate? These questions are important because "[t]he fairness and consistency of the process by which felony disputes are handled [in the trial courts] goes to the heart of our conceptions of justice."[25]

This article, in presenting findings from a study of six Colorado judicial districts, addresses these important questions. This article began as a general study of felony resolution practices, but quickly became a specific study of plea bargaining practices after it became evident that almost all of the cases examined had been resolved through negotiation without trial, and that most of the defendants had plead guilty or otherwise admitted their guilt.

By admitting their guilt, these defendants had given up arguably valuable constitutional rights such as the right to confront one's accuser(s) in a trial by jury,[26] the right to remain silent at trial,[27] the right to a presumption of innocence and the right to an acquittal after trial unless all reasonable doubt about guilt had been eliminated.[28]

While plea bargaining affects the exercise of these defendants' rights, it also impacts public rights including the right to have the punishment fit the crime, and the right to observe the administration of justice. Since the sentence was often determined before guilt had finally been resolved, important constitutional questions of due process and equal protection could have been involved if harsher sentences were imposed on those who went to trial than on those who plea bargained.[29]

If the practice observed in the six judicial districts included in this study reflects practice throughout Colorado,[30] then plea bargaining is

25. Nardulli, Flemming & Eisenstein, *Criminal Courts and Bureaucratic Justice: Concessions and Consensus in the Guilty Plea Process*, 76 J. CRIM. L. & CRIMINOLOGY 1103, 1104 (1985). It has been argued, though, that this concern for the loss of constitutional rights misses a reality: that it was the development of those valuable rights that gave defendants the bargaining power that in turn gave rise to plea bargaining. *See* Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261 (1979).

26. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speech and public trial, . . . and . . . to be confronted with the witnesses against him . . . .").

27. U.S. CONST. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself. . . .").

28. Parnas, *Proposed Legislation Facilitating Discussions of Statutory Regulations of Plea Bargaining*, 13 AM. J. CRIM. L. 381, 331 (1986).

29. However, most of the judges interviewed said that they did not impose harsher sentences on defendants who exercised their right to trial. *See* Bond, *supra* note 19.

30. The conclusions reached in this study may hold true throughout Colorado.

> Rarely . . . does a [researcher] question all of the people in whose views or behavior he or she is interested. Instead the researcher takes a subset or sample of the larger population about which he or she wishes to make inferences. The critical aspect of a sample is that it be representative of the population from which it is drawn.

D. MONAHAN & P. WALKER, SOCIAL SCIENCE IN LAW 58 (1985). This study involved an effort to do empirical research on a subject that was difficult to control, under circumstances hard to control. All data was collected by the author who had limited time and money

the standard means for the resolution of felony cases in Colorado.

IV. METHODOLOGY OF STUDY

The six districts studied were chosen for their diverseness and are thought to be representative of current Colorado practice. The study included districts from the eastern and western slope of the continental divide, districts with different population densities,[31] and districts with discernible cultural elements such as city dwellers, farmers and ranchers, ski area dwellers, and persons from diverse ethnic backgrounds. The six districts studied were the third, seventh, eleventh, twelfth, twentieth, and the twenty-first.[32] In each district, cases were examined in both the district and county courts. The districts are highlighted on the accompanying page in Diagram I.

A practical examination of hundreds of felony cases to determine how they were resolved was considered appropriate because such hard data can provide the most reliable basis for formulating proper responses to any perceived problems in the trial courts.[33] All data was collected during the first six months of 1988. Since this study was con-

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available. Simple random sampling of cases could not be used because of the need to mix rural and urban districts in the study. If only urban districts had been necessary then important interdependent variables could have been more easily controlled such as the number of case files to be examined, the time frame within which the activity was to be observed, the types of crimes involved, and the identities of the parties involved. Because rural districts had to be included an effort was made to balance these variables and stratified random sampling was therefore used to promote the representativeness of the districts and the cases examined. On the use of stratified random sampling, *see generally* W. GOODE, METHODS IN SOCIAL RESEARCH 221-25 (1952).

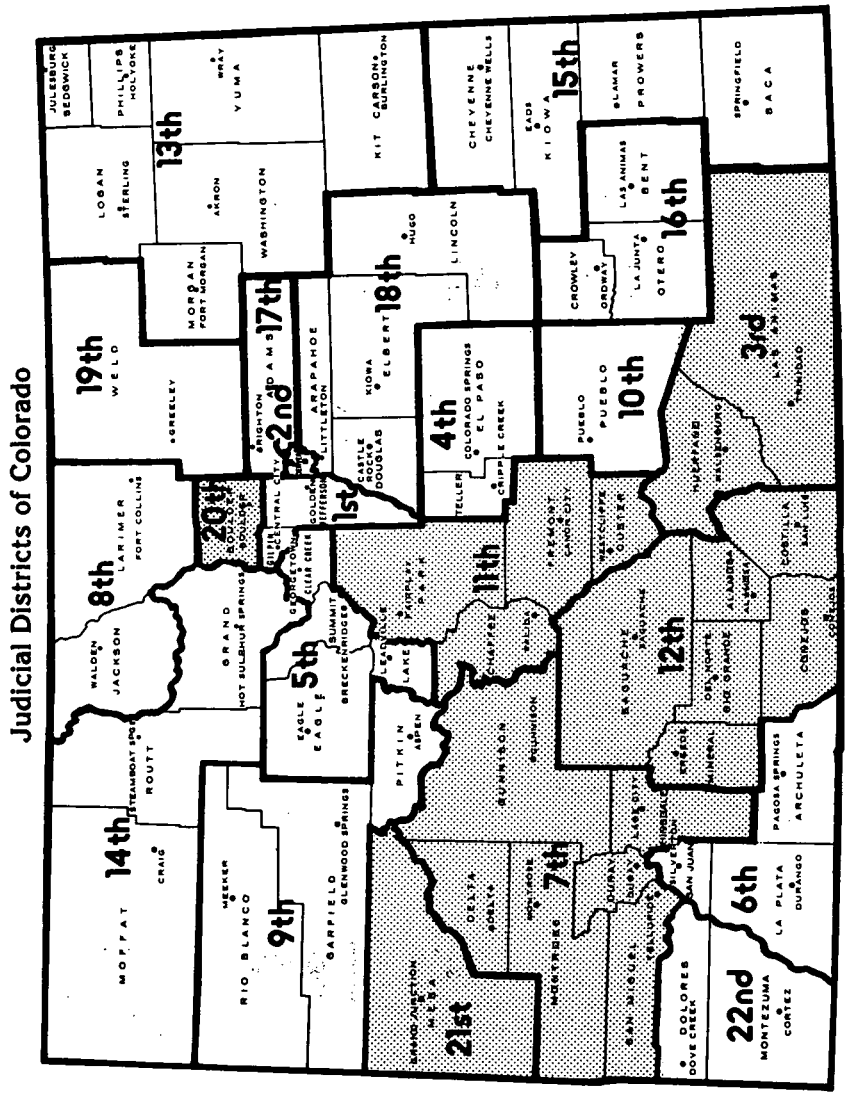
Since simple random subject selection could not be used it would be appropriate for others to replicate this study before the results offered here are afforded statewide application. For the importance of replication *see* H. BLALOCK & A. BLALOCK, METHODOLOGY IN SOCIAL RESEARCH 13-18 (1968). However, replication as confirmation requires carefully controlling significant variables which are not always possible outside a laboratory where human choice is involved, as is the case here.

In the final analysis, studies such as the one presented here may have to be limited to describing what has happened and not to infer what will happen, K. HAMMOND, INTRODUCTION TO THE STATISTICAL METHOD 9 (1963); and to identify those principles and relationships that survive across heterogeneous circumstances, *see also* W. CRANO, PRINCIPLES OF RESEARCH IN SOCIAL PSYCHOLOGY 46 (1973).

31. According to 1980 census figures, about 190,000 persons live in the twentieth Judicial District, about 81,500 in the twenty-first, about 62,000 in the seventh, about 49,000 in the eleventh, about 38,000 in the twelfth, and about 21,500 in the third. BUREAU OF CENSUS, U.S. DEPT. OF COMMERCE (1980).

32. The twentieth and the twenty-first districts are relatively well populated single-county districts. Boulder is the principal city in the twentieth and Grand Junction is the principal city in the twenty-first. The other four districts are rural, less populated, multi-county districts. There are two counties in the third district: Las Animas and Huerfano; four counties in the eleventh district: Chaffee, Fremont, Park and Sumter; and, six counties in the seventh and twelfth districts. The seventh district consists of Delta, Gunnison, Hinsdale, Montrose, Ouray and San Miguel counties. The twelfth district includes the counties of Alamosa, Conejos, Costilla, Mineral, Rio Grande and Saguache. Politically significant communities in these districts include Alamosa, Boulder, Canon City, Creede, Crested Butte, Delta, Grand Junction, Gunnison, Monte Vista, Montrose, Ouray, Salida, Telluride, Trinidad and Walsenburg.

33. On the importance of "hard data" to the proper study of trial courts, *see* Nardulli, Flemming & Eisenstein, *Criminal Courts and Bureaucratic Justice: Concessions and Consensus in the Guilty Plea Process*, *supra* note 22, at 1113 (1985). A hands-on examination was also


Judicial Districts of Colorado
1st
2nd
3rd
4th
5th
6th
7th
8th
9th
10th
11th
12th
13th
14th
15th
16th
17th
18th
19th
20th
21st
22nd

cerned with resolution practices, only closed files were included. Also, since the study was concerned with observing a significant number of cases, the time frame of activity that was observed varied. In the urban districts, this meant only going back a few months; but, in the rural districts, it often meant going back a year. Over one-hundred files were examined in each district.[34] While it was easy to find recently closed files in the more populous districts such as the twentieth, this was not possible in the rural districts such as the third.[35]

Only files that had been closed on their merits were included in the study. Files that did not present a chance for plea bargaining were excluded, such as extradition cases or cases in which the defendant failed to appear.

The author traveled to each of the courts involved in the study, and in all instances personally examined each file to limit data gathering errors. Similarly, each judge and lawyer was personally interviewed by the author.

The process used to gather information from the files was straight forward. Examination began with the most recently closed cases and proceeded backward in time. In relatively busy communities such as Boulder[36] or Grand Junction[37] this required going back only a few months, but in other districts it meant going back many months. Therefore, it was sometimes necessary to examine all of the 1987 cases to obtain an appreciable sample.[38] As expected, the duration for closing cases varied.[39] The district court cases that were examined were closed during a span of twenty-four months, with most closed between July 1987 and March 1988. Closing activity was seen in all district courts during a five month span between October 1987 and February 1988. The county court cases that were examined were closed during a span of sixteen months, with most closed between June 1987 and March 1988. Closing activity was seen in all county courts during a three month span between October 1987 and January 1988. Since all of the districts studied have more than one judge, cases were distributed among judges that were serving on the bench at the time the examined cases were resolved.

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necessary because the Colorado court system does not have and therefore cannot provide the kind of information that is necessary to conduct a study of this type.

34. The exact number of cases was not reviewed in each district for a variety of reasons including: field limitations such as constraints on the author's time and the time of court personnel; geographic limitations (rural courts in multi-county districts were typically not "busy"); time frame restrictions on practice to be observed (going back into 1986 would skew results); judge-mix needs (apportionment of cases among judges involved during the timeframe observed); and refinement needs (some cases had to be passed over because they had not provided a chance for plea bargaining or had not yet been closed or were missing from the files).

35. The Colorado court system reported by telephone on July 20, 1988, that felony district court closings in 1987 were: Ninety closings in the third district; 189 closings in the seventh district; 294 closings in the eleventh district; 100 closings in the twelfth district; 793 closings in the twentieth district; and 363 closings in the twenty-first district.

36. The twentieth Judicial District.

37. The twenty-first Judicial District.

38. *See supra* note 34 and accompanying text.

39. *See infra* Appendices A and B.

In addition to the file number, other data was also collected such as: the original police charges, formal charges that were filed by the prosecution, any changes to those charges, and the method of resolution such as dismissal, trial or plea. Furthermore, when available, an explanation of the particular type of resolution chosen was included. This often includes the prosecutor's decision not to file felony charges, to dismiss them or to reduce them to misdemeanors after filing. In addition, when available, sentencing concessions, such as guarantees of probation or agreements that limited the number of years that the defendant was to serve were also noted.

Some judicial districts do not use written dispositional stipulations or plea agreements. Thus, written explanations for a particular action were often not found in the court file. In addition, not all judges follow the American Bar Association's recommendation that court files should speak for themselves.[40] Currently, Colorado has no uniform system of plea bargain record-keeping.

V. BEHIND THE SCENES IN THE COLORADO COURT SYSTEM

A. *Plea Bargaining in County Court*

Two types of state trial courts exist in Colorado: county courts and district courts.[41] A felony case usually starts off in a county court where a county judge determines whether there is sufficient evidence to allow the case to proceed. If there is sufficient evidence the case is then forwarded to the district court for trial or other resolution. Often, however, rather than being forwarded, felony cases are resolved in the county court through the activity that is commonly known as plea bargaining.[42] In fact, a significant number of the felony cases examined appear to be resolved by plea bargaining.

Straightforward bargaining of felony cases in county courts involves the defendant's agreement to plead guilty to one or more misdemeanors in return for dismissal of all felony charges. However, other conduct, suggestive of plea bargaining, was also seen, such as complete dismissal of all charges with the defendant agreeing to pay restitution to the victim even though he had not admitted that he had committed a crime or been found guilty of committing any crime.

As Table I indicates, the frequency of straight forward plea bargaining in the county courts ranged from zero percent to twenty-six percent with most county courts showing more than fifteen percent. However, a focus on straightforward bargaining activity alone does not accurately reflect the full extent of the bargaining-type activity that may take place

40. A.B.A., *Guilty Plea Standards*, NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS PROCEEDING 69 (1973).

41. Municipal courts in Colorado are not "state" courts.

42. Only one county judge reported an absence of felony bargaining activity, saying that the district attorney did not want bargaining of felony cases to go on there. Another county judge reported little felony bargaining because most felony cases were filed directly into district court by order of his chief judge.

in the county courts. In addition to straightforward bargaining, many prosecutors also regularly dismissed cases and made other decisions suggestive of plea bargaining. The frequency of such activity is also described in Table I in the column labelled "Prosecution Dismissal."

Very few of the cases examined were dismissed for lack of evidence.[43] When those cases along with the cases that had been forwarded to the district courts for resolution were removed from consideration, the percentage of felony cases left to be resolved in the county courts ranged from twelve percent to fifty-two percent.[44] While it cannot be said authoritatively that all of these cases were resolved through bargaining-type activity because county court paper tracks are not clear enough to say that it appears that prosecutors often decided to dismiss them or lessen them following plea bargaining. As Table I indicates, many felony cases were dismissed completely in the county courts after formal charges had been filed which suggested that an agreement akin to a deferred judgment had been reached, a common felony resolution practice used in the district courts. In some instances the files contained statements to that effect, for example, that the defendant agreed to pay restitution to his or her victim even though the charges were being dismissed. Therefore, based on the information collected in this study, it appears that felony cases are often resolved in county courts through bargaining-type activity.

43. In four of the six districts in this study there were no cases that had been dismissed for lack of evidence. In one district, one case had been dismissed for lack of evidence and in another district two cases had been dismissed for that reason.

44. These percentages were derived by adding the sums of the columns in Table I labelled: "Straightforward Bargain" (the number of instances in which the prosecution had reduced felony charges to misdemeanors to which the defendant plead guilty); "Misdemeanor Charging" (the number of instances in which the prosecution charged a misdemeanor even though the defendant had been arrested for a felony); and "Prosecution Dismissal" (the number of instances in which the prosecution dismissed all charges after felony charges had been filed).

TABLE I
MODE OF DISPOSITION OF FELONY CASES IN COUNTY COURT BY DISTRICT[45]

Judicial District	Total Cases	Straight-Forward Bargaining[46]		Prosecution Dismissal[47]		Misdemeanor Charging[48]		Total Cases Possibly Bargained[49]		Boundover[50]		Miscelaneous[51]	
	n	n	%	n	%	n	%	n	%	n	%		
3rd	87	14	16	15	17	0	0	29	33	56	64	2	2
7th	108	23	21	9	8	1	1	33	30	74	68	1	1
11th	257	0	0	0	0	3	12	3	12	21	84	1	4
12th	78	19	24	20	26	1	1	40	51	33	42	5	6
20th	92	24	26	11	12	13	14	48	52	40	44	4	4
21st	92	6	7	16	17	4	4	26	28	66	71	0	0

45. In the eleventh district, at the time of this study, felony cases in Canon City were not filed in the county court but instead were filed in the district court. Hence, the percentages given here for the 11th district reflect only what was observed in Salida.

46. "Straightforward bargain" refers to those instances in which the prosecution agreed to dismiss pending felony charges in return for a guilty plea to one or more misdemeanors.

47. "Prosecution dismissal" refers to those instances in which the prosecution had decided to dismiss all pending charges after they were filed. Often, these decisions appeared to have involved bargaining, where the charges were dismissed but the defendant nevertheless tacitly admitted criminal liability by agreeing to pay restitution.

48. "Misdemeanor charging" refers to those instances in which the police had arrested the defendant for a felony but the prosecution had charged a misdemeanor.

49. "Total cases possibly bargained" reflects the sum of the columns labelled: "Straightforward Bargain", "Prosecution Dismissal" and "Misdemeanor Charging."

50. "Bound-over" refers to those instances in which the county judge determined there was sufficient evidence for trial. Thus, any bargained resolution was presented in the district court and not the county court.

51. "Miscellaneous" refers to those instances in which the prosecution had decided after reviewing the police reports to not file any charges, and it also refers to those instances in which the county judge had decided to dismiss the felony charge because there was not enough evidence for trial.

B. *Plea Bargaining in District Court*

Table II describes how often customary felony resolution techniques used in district court were observed. These techniques include voluntary dismissal by the prosecution, non-induced pleas of guilty from defendants, straight forward bargaining, and trial. As Table II shows, felony cases were often resolved through straightforward bargaining, ranging from sixty-five percent in some districts to eighty-eight percent in others. When the cases that were obviously bargained are added to those that were voluntarily dismissed by the prosecution, as many as ninety-five percent of the district court cases may have been resolved through negotiated admissions of responsibility, which confirms national estimates.[52]

The files of cases that were voluntarily dismissed by the prosecution often reflected that some bargaining had occurred. In many instances, defendants agreed to pay restitution to the victims even though the case had been dismissed. Thus, it is appropriate to consider cases that were voluntarily dismissed by the prosecution along with the cases that were obviously bargained.

In the Grand Junction district,[53] eighty-eight percent of the cases were clearly resolved through bargaining and perhaps as many as ninety-nine percent when the cases voluntarily dismissed by the prosecution are added. In the Boulder district,[54] at least eighty-three percent of the cases were resolved through bargaining and perhaps all of the cases examined when those voluntarily dismissed by the prosecution are added. In the Alamosa district,[55] at least eighty-one percent and perhaps ninety-five percent of the cases examined were resolved through plea bargaining. In the Canon City/Salida district,[56] at least sixty-five percent of the cases were resolved through bargaining and possibly eighty-nine percent when those voluntarily dismissed by the prosecution are added. In the Montrose/Gunnison/Telluride district,[57] at least eighty-two percent of the cases examined were resolved through plea bargaining and perhaps ninety percent after those dismissed by the prosecution are added. Finally, in the Trinidad/Walsenburg district,[58] at least seventy-five percent of the cases examined were resolved through bargaining and possibly ninety-four percent when the cases voluntarily dismissed by the prosecution are added.

52. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *Task Force Report: The Courts* 9 (1967).
53. The Twenty-first Judicial District.
54. The Twentieth Judicial District.
55. The Twelfth Judicial District.
56. The Eleventh Judicial District.
57. The Seventh Judicial District.
58. The Third Judicial District.

TABLE II
MODE OF DISPOSITION IN THE DISTRICT COURT BY DISTRICT

Judicial District	Total Cases	Straight-Forward Bargaining[59]		Prosecution Dismissal[60]		Total Cases Possibly Bargained		Trial		Plea Without Concession[61]		Miscellaneous[62]	
	n	n	%	n	%	n	%	n	%	n	%	n	%
3rd	69	52	75	13	19	65	94	4	6	0	0	0	0
7th	105	87	82	8	8	94	90	11	10	0	0	0	0
11th	75	49	65	18	24	67	89	0	0	3	4	5	6
12th	55	45	81	8	14	53	95	1	2	1	2	0	0
20th	93	77	83	16	17	93	100	0	0	0	0	0	0
21st	99	87	88	11	11	98	99	1	1	0	0	0	0

59. "Straightforward bargaining" means those instances in which the prosecution agreed to either defer judgment, reduce charges, abandon some charges, grant sentencing concessions, or to a compilation of the foregoing. The average instance of straight forward bargaining of felony cases in the district courts in the six districts studied was percent.

60. "Prosecution dismissal" means the prosecution, not the court, dismissed the case. Such dismissal often appeared to involve bargaining.

61. A "Plea Without Concession" is a plea of guilty to the charge(s) originally filed without concession from the prosecution.

62. "Miscellaneous" means the felony charges were dismissed by the district court or at the instigation of the district court for reasons such as suppression of evidence. It also includes instances in which the prosecution decided, after arrest, to not file any charges or decided to proceed with less serious charges.

VI. Discussion

Colorado plea bargaining practices are not uniform; they differ from district to district, prosecutor to prosecutor, and judge to judge. The techniques used and the results obtained depend on numerous variables such as the parties involved in the process, the location, as well as the types of offenses being negotiated. Therefore, while it is true that the vast majority of felony cases are resolved through negotiated admissions of responsibility, it is important to note that the process, while being pervasive, is also site specific. For example, some prosecutors reported limits on plea bargaining while others reported different limits, and some judges were willing to allow limits on their sentencing discretion while others were not.[63]

The effort undertaken by this study was to begin an empirical examination of the felony resolution practices in Colorado. In many instances, the practice in a particular court pursuant to the local legal culture may be predictable and local practice may produce justice in individual cases. Additional research is needed to distinguish between bargaining techniques that reach the same end in all cases and techniques that may lead to different results in the same type of cases. Additional research is needed to examine how the various plea bargaining techniques are effected by factors such as the charges originally filed, the defendant's prior record, and mitigating circumstances.

Some of the plea bargaining seemed tailored to a specific case while other bargaining appeared routine and bureaucratic, bureaucratic in the sense that it seemed to reflect administrative pressures to move cases along rather than careful consideration of individual cases. Examples of such bargaining include: regularly granting deferred judgments without conviction of any offense to first-time felony offenders; regularly affording defendants dismissal-on-restitution if they were accused of crimes just inside the felony range such as theft of property valued at $350; and regularly granting sentencing concessions to serious offenders.

Plea bargaining's many forms suggest that care can be taken with individual defendants and victims to fashion appropriate results. Nevertheless, its many forms also suggest a potential for justice to be administered quite differently in arguably similar cases. Successful plea bargaining usually involves the interplay of many resolution techniques including deferred judgment,[64] abandonment of charges, reduction of charges, dismissal of charges, and sentencing concessions. As Table III indicates, the instances in which these plea bargaining techniques were used in each district varied. For example, the instances in which district court felony cases were resolved by reducing charges ranged from fourteen percent in the twentieth district to forty percent in the twelfth district, and the instances in which district court felony cases were resolved

63. *See infra* Appendices A and B.

64. A deferred judgment involves a plea of guilty to the charge but not a conviction. The case is dismissed, on the prosecution's motion, if the defendant completes a probationary-type period.

TABLE III
FREQUENCY OF USE OF STANDARD PLEA BARGAINING TECHNIQUES IN DISTRICT COURT[65]

Judicial District	Prosecution Dismissal		Deferred Judgment		Abandonment of Charges		Reduction of Charges		Guaranteed Probation		Sentencing Caps	
	n	%	n	%	n	%	n	%	n	%	n	%
3rd	13	17	11	15	10	13	25	33	0	0	1	11
7th	8	8	20	20	26	25	31	30	11	11	11	11
11th	18	24	15	20	14	19	11	15	10	13	18	19
12th	8	15	13	24	15	27	22	40	0	0	4	7
20th	16	17	33	35	38	41	13	14	12	13	15	16
21st	11	11	9	19	30	30	24	24	12	12	21	21

65. Often, several techniques were used in the same case. For example, some charges might have been reduced, others abandoned, and probation guaranteed, all in one case.

through deferred judgments ranged from fifteen percent in the third district to thirty-five percent in the twentieth district.

This varied use of plea bargaining techniques suggest a lack of order and a lack of statewide policy. If plea bargaining practices were in fact driven by statewide policy, then the differences between the observed frequencies of use of specific plea bargaining techniques and the expected frequencies of use should be small. In other words, one would expect the frequencies of use of these techniques to be generally the same across district lines. However, the opposite was observed. Indeed, the frequencies of use of these techniques varied considerably from district to district. Social scientists often use the statistic chi square to analyze this type of data.[66] We may hypothesize that a particular plea bargaining technique will be seen a certain number of times, and then state how many of a sample of cases should show use of that technique. If the hypothesis is acceptable, the difference between observed and expected should be no larger than on the basis of chance. If the observed difference is too large, not apt to arise from chance, the stated hypothesis becomes suspect. Using the chi square analysis, the potential that chance would produce the variety of use observed here is one in a thousand.[67] Therefore, it is reasonable to suggest that each district employs a unique policy, and that there is no cohesive statewide policy.[68]

The varied use of techniques also suggests that the prosecutors and judges involved did not have shared attitudes about the use of these resolution techniques, which they often confirmed in their interviews.[69] Furthermore, the variety of use suggests that the locale of the prosecution and the attitudes of the individuals involved affected how the cases were handled.[70]

VII. RECOMMENDATIONS

In the six districts studied, plea bargaining appears to be site specific, which reflects, among other things, lack of agreement on its acceptable features and on its proper limits. The absence of recognized, statewide standards for judicial review of proposed plea bargains results in a lack of uniform practice.[71] The absence of such standards explains

66. The "chi square" analysis is the sum of the squared differences between the observed and expected frequencies, each divided by the expected frequencies.

67. *See infra* Appendix C.

68. For general discussion on the use of chi square, *see* G. MCNEMARA, PSYCHOLOGICAL STATISTICS (3d ed. 1966).

69. *See infra* Appendix A.

70. Should the particular prosecutor, defense attorney or judge involved in a case make a difference for bargaining purposes?

71. *See, e.g.*, WASH. REV. CODE ANN. §§ 9.94A.430-.460 (1988 & Supp. 1989) (recommended prosecuting standards for charging and plea dispositions). Regarding any plea disposition, the general standard in Washington State is that "a defendant . . . [i]s expected to plead guilty to the charge or charges which adequately describe the nature of his or her criminal conduct or go to trial." WASH. REV. CODE ANN. § 9.94A.450 (1988). The statute goes on to describe a limited number of exceptions to this general rule and the circumstances which give rise to their application. Also included in the statutory scheme are specific guidelines regarding the decision to prosecute.

why plea bargaining is personal, geographic and clubby, and why it does not now appear to be subject to the rule of law.[72]

The rule of law calls for decisions to be made through the application of known principles with minimum intervention of discretion in their application. While the american west has been described as having traditionally minimized the role of the rule of law and granted prosecutors legally questionable discretion,[73] too much discretion is recognized as being dangerous to contemporary legal systems. The contemporary philosopher John Rawls has warned that:

> [i]f deviations from justice as regularity are too pervasive, a serious question may arise whether a system of law exists as opposed to a collection of particular orders designed to advance the interests of a dictator or the ideal of a benevolent despot. . . . The Rule of Law . . . implies the precept that similar cases be treated similarly.[74]

A. *The Need for Legislative Action*

Clearly, uniform equal criminal justice, is not being achieved through uniform procedure.[75] If such uniformity is to occur it will likely require legislative action. The form that such legislative action takes will obviously be of great consequence to every individual who becomes involved in plea bargaining.

Legislative action would likely reflect a desire to restrict, or at least inhibit, current plea bargaining activities. For example, the Colorado General Assembly could try to inhibit the current avoidance of its *de facto* sentencing guidelines. Under current legislative policy, mandatory imprisonment and stiff prison sentences are required in many instances. Yet these requirements are not followed when the prosecution agrees not to file sentencing enhancement charges, or agrees to abandon such charges after they are filed, or permit deferred judgments, or agrees to grant sentencing concessions.

The General Assembly could also require that defendants accept full responsibility for the crime(s) they actually commit. For example, the General Assembly might try to inhibit the widespread use of deferred judgment, a seductively disarming felony resolution technique. When judgment is deferred in felony cases, the accused pleads guilty to a serious crime, the prosecution "wins" another case, and the court is able to move on to other pressing cases. However, built into this process is an assumption on the part of accused felons that they will success-

72. For a definition of the "rule of law" *see* Black's Law Dictionary 712 (5th ed. 1979).

73. *See supra* note 24.

74. J. Rawls, A Theory of Justice 237-38 (1971). For a general discussion of differing notions about the rule of law in contemporary society, *see* R. WOLFF, THE RULE OF LAW (1971).

75. Joint Anti-Fascist Refuge Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring). Justice Douglas stated that "[s]teadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Id.* at 179. *See also* O'Conner, *Pretrial Publicity, Change of Venue, Public Opinion Polls—A Theory of Procedural Justice*, 65 U. DET. L. REV. 170 (1988).

fully complete probationary-like terms that usually last two or more years. If they do, then the prosecution will dismiss the on-hold felony charges and the felony conviction will be avoided.

Many accused felons are willing to make the assumption that they will successfully complete such probationary-like terms. Unfortunately, it is an assumption that does not always prove to be true. Deferred judgments *are* revoked and defendants then find themselves convicted of felonies without the benefit of trial. Such defendants sometimes claim they were pressured into admitting their guilt and claim that they have been victimized by an oppressive system. When this happens, guilty pleas and determinations of guilt lose their moral force and defendants do not assume responsibility for the crime(s) they actually commit.

This does not mean that deferred judgment is inappropriate in every case and that the General Assembly should prohibit it altogether. Rather, these circumstances might impel the General Assembly to require more direct involvement of trial judges in the plea bargaining process, and to require a fuller record in each case than is now required.

B. *Guidelines to be Followed*

Any statutory guidelines and requirements concerning plea bargaining should balance the rights of the accused, the safety of the public, and the economic reality of scarce judicial resources. Statutory guidelines and requirements should therefore describe:

1. The factors that the prosecution must consider in determining whether to decline to prosecute some or all of the possible charges that might lead to conviction, and whether to agree to sentencing concessions.
2. The circumstances that the prosecution must show exist to support the proposed plea bargain in each case.
3. The factors that the prosecution must show exist to warrant avoidance of sentencing enhancement policies established by the General Assembly.
4. The rights that similarly situated defendants have to equal opportunities to resolve their criminal charges without trial.
5. The findings that trial judges must ordinarily make to warrant approval of the plea bargains proposed in each case.
6. The circumstances in which a guilty plea should not be accepted, including the circumstances, without limitation, in which it should be found that the public interest would not be served by a proposed plea bargain.
7. The trial judge's duty, if any, to ensure that evidence exists to support a finding of guilt where the defendant pleads guilty while asserting innocence.
8. The circumstances when it is appropriate to record the terms of a plea bargain in chambers and not in open court.[76]

76. For an example of a statute that might work in Colorado, see Parnas, *Proposed Legislation Facilitating Discussion of Statutory Regulation of Plea Bargaining*, 13 AM. J. CRIM. L. 381 (1986).

Additional factors relating specifically to current Colorado practice that ought to be considered in the formulation of appropriate guidelines include:

1. County judges are often involved in the plea bargained resolution of felony cases. Therefore, they are required by Colorado criminal procedure to exercise the same "independent judgment" over proposed plea bargains that district judges are accustomed to exercising.[77] Since all of Colorado's county judges do not have to be full-time judges and do not always have to be lawyers, clear standards enumerating a judge's duties for plea bargains would probably greatly assist them.
2. Prosecutors and judges do not all agree on the appropriate parameters of plea bargaining. Therefore, specific guidelines should be set for statewide policies on issues such as:

(A) May all charges be dismissed because the defendant has agreed to make or has made restitution?

(B) When is it appropriate that deferred judgment be granted without conviction of any offense? Is it generally appropriate in any of the following instances: When it is the defendant's first serious offense, or when the defendant is young, or when the defendant has made or agreed to make restitution?

(C) May sentence concessions routinely be a part of plea bargains? If so, what are the proper parameters of such concessions? Are restrictions on sentencing and guarantees of probation appropriate? And if so, when?

(D) What rights do victims have to participate in or be made aware of plea discussions?[78] Should the court be made aware of the victim's concerns?[79]

(E) Should plea bargains customarily be reduced to writing and become part of the court file in each case?

(F) Should all district attorneys publish broad policy guidelines on plea bargaining?[80]

C. *Propriety of Judicial Supervision of Plea Bargaining*

Although procedural rules now exist in Colorado to regulate the

77. COLO. R. CRIM. P. 11(f)(5).

78. COLO. REV. STAT. § 16-11-601 (1986) (recognizing a victim's right to be heard at sentencing).

79. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U.L.Q. 301 (1987) (arguing that victims should have a limited right to be heard). *See also* Van den Haag, *Limiting Plea Bargaining and Prosecutorial Discretion*, 15 CUMB. L. REV. 1 (1984).

80. A.B.A., *Project on Minimum Standards for Criminal Justice Relating to the Prosecution Function and the Defense Function*, Standard 2.5 (Tentative Draft 1970). These guidelines should be flexible enough to permit individual exercise of discretion, but specific enough to make general policies known to the bar, the bench, and the public; policies that will contribute to the fair, efficient, and effective enforcement of criminal law. The Boulder County District Attorney's office has had written plea bargaining policies since 1982. Eleven of the twelve lawyers interviewed said that they were aware of existing, unwritten policies "published" by their local district attorney's offices. *See also* Bond, *Plea Bargaining in North Carolina*, 54 N.C.L. REV. 823, 834-36 (1976).

acceptance of guilty pleas from defendants and to regulate requests from prosecutors to dismiss pending cases,[81] the terms used in these rules are inherently ambiguous[82] and incomplete.[83]

These rules suffer from other infirmities as well. They do not make it possible to consider court determinations of guilt based on plea bargains as reliable as determinations of guilt that follow trial. This is true because the rules do not require that a judge determine that there is sufficient evidence for a conviction based on a plea bargaining. Furthermore, a trial judge's ability to protect the public interest is limited because these rules do not describe when the reasons given for a proposed plea bargain are to be deemed adequate or inadequate.[84]

Although it may be difficult to develop and enforce standards specifically applicable to plea bargaining, such standards are necessary if the system is to maintain its moral force.[85] Fortunately, much of the legal groundwork for the development of such standards already exists. When the United States Supreme Court endorsed plea bargaining in *Santobello v. New York*,[86] it declared that there was no absolute right to plead guilty, and that a plea of guilty could be rejected in the exercise of sound judicial discretion.[87] A respected observer commented that: "[A] judge is expected to check the plea bargaining practices of prosecutors and reject plea bargains that are not appropriate to the total circumstance . . . ."[88]

A current member of the Colorado Supreme Court, formally its chief justice, has suggested that while the trial judge must be sensitive to the accused's rights, the trial judge must also avoid endorsing any effort to secure leniency for its own sake, leniency that is not, for example, requested in the presence of contrition, repentance or remorse.[89] Other respected observers, commenting on the importance of judicial supervision, have noted that:

> If . . . exchange or bargaining interactions dominate criminal court operations, then the fears of those who cherish the ideals of due process would be realized. The indiscriminate manipulation of the powers entrusted to public officials to coerce defendants into yielding important constitutional rights . . .

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81. COLO. R. CRIM. P. 11; COLO. R. CRIM. P. 48(a).

82. Pursuant to Colorado Rules of Criminal Procedure 11, the court may not accept a plea of guilty unless it is "voluntary." However, voluntary is not easy to define.

83. Pursuant to Colorado Rules of Criminal Procedure 48(a), a prosecutor cannot dismiss a pending case without court approval. While this rule requires that requests to dismiss be supported in writing by concisely stated reasons, the rule does not describe when the reasons given are to be deemed adequate or inadequate, and neither does Colorado case law.

84. *See supra* note 81.

85. *See supra* notes 5 & 75 (both expressing a concern that law maintain its moral force).

86. 404 U.S. 257 (1971). The Colorado Supreme Court has also endorsed plea bargaining. *See* People v. White, 182 Colo. 417, 514 P.2d 69 (1973); People v. Dobbs, 175 Colo. 273, 486 P.2d 1053 (1971).

87. *Santobello*, 404 U.S. at 257, 262.

88. R. MCDONALD, PLEA BARGAINING 109 (1978).

89. Erickson, *Finality of Pleas of Guilty*, 48 NOTRE DAME L. REV. 835, 841 (1973).

> breed(s) contempt and resentment instead of remorse and resolve . . . and undermines the justice system's credibility and legitimacy in the eyes of the public.[90]

In Colorado, plea bargaining is an established institution expressly permitted by statute, court rule, and case law.[91] However, specific standards for its regulation have not been adopted by the supreme court or the General Assembly. Pursuant to the applicable American Bar Association standard, a plea bargain should only be approved:

> [w]hen consistent with the protection of the public, the gravity of the offense, and the needs of the defendant, and when there is substantial evidence to establish that: (i) the defendant is genuinely contrite and has shown a willingness to assume responsibility for his or her conduct; (ii) the concessions will make possible (more appropriate) correctional measures . . . or will prevent undue harm to the defendant from the conviction, or (iii) the defendant . . . has demonstrated genuine consideration for the victim(s) . . . by desiring either to make restitution or to prevent unseemingly public scrutiny or embarrassment to them; or (iv) the defendant has (or will) cooperate . . . in the successful prosecution of other(s) . . . .[92]

In short, before accepting a negotiated plea, a trial judge should be able to find from the record that the plea serves the public interest.

Colorado's trial judges are required to subject proposed plea bargains to their independent judgment.[93] To what extent they may, or should, interpose themselves into the plea bargaining process, however, is unclear.

In most states,[94] the prosecution may not dismiss charges without judicial approval,[95] and, in most states, trial judges may, and often do, participate in plea discussions.[96] By contrast, at the federal level, trial judges are not expected to participate in plea discussions despite the fact that they do possess some limited power to regulate the process.[97] The Colorado Supreme Court, while ostensibly following the restrictive federal rule, has consistently backed trial judges who rejected proposed plea bargains. In so doing, however, it has offered little direction for

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90. *See supra* note 25.

91. COLO. REV. STAT. § 16-7-301 (1986); COLO. R. CRIM. P. 11(f)(5); People v. Macrander, 756 P.2d 356 (Colo. 1988); People v. Lucero, 714 P.2d 498 (Colo. 1985); People v. McGhee, 667 P.2d 419 (Colo. 1983); People v. Wright, 38 Colo. 271, 559 P.2d 249 (1976), *aff'd*, 194 Colo. 448, 573 P.2d 551 (1978).

92. A.B.A. Standards, *Plea of Guilty*, § 1.8 (1968).

93. COLO. R. CRIM. P. 11(f)(5).

94. Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 186, 207 n.73 (1976).

95. Note, *Judicial Discretion to Reject Negotiated Pleas*, 63 GEO. L.J. 241, 255 n.93 (1974).

96. FED. R. CRIM. P. 11(e)(1); U.S. v. Adams, 634 F.2d 830 (5th Cir. 1981).

97. U.S. v. Perate, 719 F.2d 706 (4th Cir. 1983); U.S. v. N.V. Nederlandsche Combinatie Voor Chemische Indus., 75 F.R.D. 473 (S.D. N.Y. 1977); U.S. v. Cowan, 524 F.2d 504 (5th Cir. 1975); U.S. v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973). It should be noted though that federal authority is shaky because in *Cowan* and *Ammidown*, denial of the prosecution's request to dismiss was deemed an abuse of discretion. In *Perate*, denial was affirmed on procedural grounds peculiar to that case, and in *N.V. Nederlandsche Combinatie Voor Chemische Industries*, denial was accepted and not appealed.

future conduct.[98]

VIII. ANALYSIS

In general, the criminal justice system is becoming more administrative and less adversary.[99] Consequently, judges and other court officials are in danger of becoming mere figureheads.[100] Most cases today are resolved through the process of plea bargaining, a process that many observers believe is premised not on strict adherence to any consistent constitutional ideology, but on strict adherence to a bureaucratic routine grounded on pragmatic concerns.[101]

This process has its own unwritten rules embedded in the social and cultural experience of the courtroom.[102] Over a period of time, the lawyers and judges involved in this process have developed shared notions of what is fair, both generally and specifically.[103]

While we may have, as citizens, chosen to place considerable faith in the criminal justice system's ability to produce just results through such a cultural system,[104] the system's players, its lawyers and judges, have never had unfettered discretion to arrive at whatever results they think are fair, free from public accountability. Lawyers and judges have always been expected to be accountable to the law and to society's needs. However, in the context of plea bargaining, lawyers and judges do not appear to be involved in a publicly accountable process because plea bargaining has low visibility with little public ceremony.[105] It is a relatively private activity, subject only in reality to a local legal culture. If acceptable standards governing the process can be developed, however, the criminal justice system will be better equipped to deliver statewide, uniform, equal justice without having to depend on a local legal culture. Such standards might also help to facilitate the emergence of professional and public scrutiny of the process which is essential to a properly functioning criminal justice system.[106]

Our criminal justice system is adversarial in nature[107] and produces

98. People v. Lucero, 714 P.2d 498 (Colo. 1985); People v. McGhee, 667 P.2d 419 (Colo. 1983); People v. 10th Dist. Court, 586 P.2d 1329 (Colo. 1978).

99. J. Bond, *Plea Bargaining in North Carolina*, 54 N.C.L. REV. 823, 836 (1976).

100. Alschuler, *Alternatives to Plea Bargaining*, 50 U. CHI. L. REV. 931, 933 (1983). About half the judges interviewed agreed; the remainder said that judges were not figureheads if they properly exercised the independent judgment required by Colorado Rules of Criminal Procedure 11(f)(5). *See infra* Appendix A.

101. *See supra* note 25, at 1129-31.

102. *See* L. MATHER, PLEA BARGAIN OR TRIAL, 2 (1979); *see also* Dear, *Adversary Review*, 57 DEN. U.L. REV. 401, 403 (1980).

103. R. ROSETT, JUSTICE BY CONSENT 90 (1976).

104. *See supra* note 14, at 104 (faith in our criminal justice system is questioned).

105. It has been previously recognized that because of plea bargaining's closed nature, Colorado courts are only superficially able to observe counsel's performance and determine whether it meets constitutional standards. *See* Dear, *supra* note 99, at 403.

106. *See* McDonald, *Judicial Supervision of the Guilty Plea Process: A Study of Six Jurisdictions*, 70 JUDICATURE 203 (1987) (noting that the trial judge is the key actor in efforts to "tame the dragon").

107. *See* Colquitt, *Judicial Use of Social Science Evidence at Trial*, 30 ARIZ. L. REV. 52, 69 n.174 (1988) (whether it can remain so continues to concern thoughtful judges).

legal principles and articulates legal rights in contested cases only. The plea bargaining process, however, is designed to produce consensus or concession.[108] This emphasis on settlement materially inhibits the occurrence of appellate review, the process through which legal principles and rights are routinely developed. Appellate review minimizes the balkanization of the legal system into separate fiefdoms by developing uniform policies to be evenly applied regardless of locale or local legal culture. Furthermore, it has promoted respect for the rule of law. These benefits, traditionally derived from the adversarial system, ought to be preserved and can be maintained through properly articulated and enforced plea bargaining standards. Therefore, without such standards the public may continue to perceive the administration of justice as a backroom process which is significantly affected by such factors as the locale in which the case is heard and how much influence the parties involved have.[109]

X. CONCLUSION

This hands-on study of approximately one thousand recently closed felony cases has established that felony cases are customarily resolved through plea bargaining, a process that produces a negotiated admission of guilt or responsibility for a crime which may be less serious than the crime actually committed, or for a crime that did not occur. Furthermore, plea bargaining is pervasive. Accused felons rarely exercise their constitutional right to have unanimous juries of twelve determine that guilt has been established beyond any reasonable doubt.

Plea bargaining is currently subject to a local legal culture, there-

108. A respected commentator has argued that our criminal justice system has been altered from one that was adjudicatory to one that is now concessionary because procedural safeguards have rendered regular trials unworkable. As a consequence, he argues, the system now "condemns without adjudication." He says that our system is now similar to the medieval european system which, also due to procedural safeguards, came to use torture to insure that confessions were reliable. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 1 (1978). Others argue that an adjudicatory system is still possible if more expeditious procedures are used, such as smaller juries non-unanimous verdicts, or trials without juries in some felony cases. *See, e.g.*, Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984); Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to Plea Bargaining*, 50 U. CHI. L. REV. 931 (1983). While the Supreme Court has sanctioned state use of six person juries and state use of non-unanimous verdicts, *see* Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972); Williams v. Florida, 399 U.S. 78 (1970), present social science studies have questioned the reliability of decisions by six as compared to twelve persons, and of decisions by non-unanimous juries. HANS & VIDMER, JUDGING THE JURIES (1986). Many of the judges interviewed said they could accept changes in trial procedures if it would reduce plea bargaining. Former University of Colorado law professor Albert Alschuler, a proponent of less plea bargaining, was quoted as having said: "Trials could be simpler. We created this elaborate trial mechanism, and then we decided we cannot afford to give it to the overwhelming majority of the people accused of crimes, so we snooker most of them into foregoing any kind of trial at all." Rocky Mountain News, Dec. 20, 1987 at 24, col. 3. *See supra* note 25.

109. The Colorado Bar and Denver Bar Association commissioned a survey of six hundred Colorado residents in which it was reported that 63 percent of those surveyed thought that plea bargaining was wrong. 16 COLO. LAW. 3 Bar Notes (Sept. 1987). *See also* Bailey & Gerhardt, *The Law Machine*, The Rocky Mountain News, Oct. 13, 1987, at 32.

fore, any result obtainable through the process depends upon the geographic locale and the participants involved. While most judges do exercise some degree of control over the process, many judges are unclear as to how much control they are required or entitled to exercise.

While the public may conceptually believe in the presumption of innocence, the public may not understand that the presumption is effectively lost in the current criminal justice system once formal felony charges are filed because the system places considerable pressure on most felony defendants to admit they are guilty of something.[110] The existing system is in need of more meaningful regulation to insure that equality of treatment, due process of law, and adherence to the rule of law is afforded to individual defendants and to society.[111] Therefore, because the process, as it now exists, is not truly accountable to the public, I propose the commission of a detailed empirical study of the plea bargaining process with an eye towards enacting a comprehensive statewide plea bargaining guideline system.

110. More than one of the author's colleagues has vigorously questioned whether this study supports this conclusion. These judges believe that defendants who bargain would not give up their right to be presumed innocent if they did not believe they were guilty.

Varying inferences may be drawn from the data produced in this study. The substantial number of accused felons who engaged in plea bargaining and then admitted they were guilty of something suggests that plea bargaining had influenced them to give up the presumption of innocence. Whether the presumption has indeed been effectively lost in the present Colorado system must await further empirical research on questions such as: would accused felons in Colorado give up the presumption as often as they do now if they weren't offered the incentives they are now offered? How often would defendants admit their guilt if prosecutors were perceived as having filed the correct charges and not overcharged, and plea bargaining were not allowed?

111. Other questions appropriate for a study include: What effect does conflicting Colorado legislative policy have on plea bargaining? How is pervasive plea bargaining likely to affect the continued viability of constitutional rights in Colorado? Will trial-related rights wither away? How does plea bargaining affect the public's perception of the Rule of Law and courts as a central piece in Colorado affairs?

APPENDIX A

A. *Preface*

The twenty-seven judges whose cases were studied were interviewed by the author. Seventeen were district and ten were county judges. Two of the county judges could not answer some of the questions because felony plea bargaining did not occur in their courts in conformance with local practice. Interviews were conducted by telephone and each interview took about forty-five minutes. The questions set out below were asked of each judge but not necessarily in the order presented here.

B. Questions of Judges and Their Responses

QUESTION 1. Which of the following three statements about plea bargaining appeals most to you?

a. That it is an economic necessity.
b. That it is not economically necessary and should be sharply curtailed.
c. That it is an inevitable feature of human nature.

QUESTION 2. What do you think drives plea bargaining? What is its engine?

ANSWER: Only six of the twenty-seven judges said that plea bargaining should be sharply curtailed. Twenty-one felt that it was economically and psychologically necessary. Thirteen of the twenty-one said that human nature was its primary engine, citing most often a desire for justice and certainty of result. A few felt it was due to lazy prosecution. Seven of the twenty-one felt that economics was its primary engine.

QUESTION 3. Could prosecutors bargain less if they wanted to?

ANSWER: Every judge said that less plea bargaining was possible.

QUESTION 4. By what standards do you measure proposed plea bargains? How do you exercise your independent judgment?

ANSWER: Most said that they did not get in the way of proposed bargains unless the deal seemed unconscionable. Words and phrases often used included: Is it fair? equitable? shocking? reasonable? Does it make sense? All conveyed the message that they examined the facts and engaged in a personal, subjective assessment of the proposed bargain. A few said they looked for real agreement, for example: does the agreement resolve the case to everyone's satisfaction?

QUESTION 5. How much do you, by your involvement, maintain and thereby support plea bargaining?

ANSWER: Twenty-two of the twenty-seven judges said that they, by their behavior, supported plea bargaining; three said some; and two said that they only supported it a little.

QUESTIONS 6 & 7. Do you agree that the public believes that plea bargains allow defendants to "get away with something," even if that is a mistaken belief?
How does that perception affect the public's overall perception of the administration of justice?

ANSWER: Most said that the public does believe that plea bargaining allows defendants to get away with something, and that this perception disserves the courts. Some felt that the public does not understand what plea bargaining is all about and that there is a need for public education.

QUESTION 8. Should the criminal justice system reinforce moral notions of guilt and responsibility? Does plea bargaining undermine that by injecting amoral, commercial, business notions into the process?

ANSWER: Although they varied as to its importance, twenty-four judges said that the system should reinforce notions of guilt and six of those twenty-four said that plea bargaining undermines it. Seventeen answered the question about whether plea bargaining undermines notions of guilt with a "no" giving a variety of reasons including that defendants who plea bargain do admit that they are guilty of something. A few thought that plea bargaining served other important purposes such as not putting victims through trial. Some felt that plea bargains often produce the same results that trials produce. Others felt that trials do not produce the moral results desired anyway. Three judges felt that most cases do not require that findings of guilt be filled with moral content.

QUESTION 9. Do you agree that some rights are sufficiently important to warrant restriction of plea bargaining, such as the right to an official determination that the evidence could support a finding of guilt beyond any reasonable doubt and the right to have punishment fit the crime?

ANSWER More than two-thirds of the judges believe that important rights do not require reduction of plea bargaining, probably because most believe in it. "Plea bargaining protects rights by getting at the truth." Several judges said that, "plea bargaining works if the judge does his/her job."

QUESTION 10. Could trials be made available to everyone if existing resources were used more efficiently?

ANSWER: More than half the judges felt that trials could be made available under the existing system: fourteen said that the system would not become clogged and eleven said that it would.

QUESTION 11. Would you object to changing trial procedures if it reduced the need for plea bargaining? Changes such as: limiting the size of juries and their availability; eliminating the need for unanimous verdicts in all cases; and further limiting the scope of the jury selection process?

ANSWER: Most of the judges would be willing to consider changing current procedures to reduce the economic need for plea bargaining: twelve said that the proposed changes did not bother them; eight said they might endorse changes depending on what they were, and five said they did not like the proposed changes.

QUESTION 12. Do defendants have a right to know what their sentences will be before they plead guilty?

ANSWER: Only four judges said that defendants have a right to know what their sentences will be before they should be expected to plead guilty. The rest do not feel that defendants have such a right.

QUESTION 13. Does plea bargaining promote laziness, self-interest, and incompetence among lawyers?

ANSWER: Most of the judges said that plea bargaining can promote incompetence, etc., among lawyers: Seventeen said yes it does; five said no; and three said sometimes.

QUESTION 14. Does plea bargaining increase the risk that cases will be resolved through favoritism and personal influence?

ANSWER: Most said that plea bargaining can promote favoritism and personal influence: Ten said yes it does; seven said maybe; and eight said no.

QUESTION 15. Does plea bargaining allow court personnel to avoid legislative policy, for example, by bargaining away sentencing enhancement charges?

ANSWER: Most said that plea bargaining permits avoidance of legislative policy: sixteen said that it did; three said no; and six said not really because, "it's a rational disregard," or "the General Assembly has given prosecutors discretion to amend conflicting legislative policies," or "what is the central legislative purpose"?

QUESTION 16. Can plea bargaining promote:

a. inequality in the treatment of individual defendants?

b. unwarranted leniency toward certain defendants?

c. conviction of the innocent?
d. confusion of the functions of adjudication and sentencing?

ANSWER: More than half of the judges felt that plea bargaining does not promote conviction of the innocent. A little less than two-thirds felt that it could promote inequality; over two-thirds felt that it could promote leniency; and more than half felt that it confused the functions of adjudication and sentencing. In the latter instance, several judges felt that these functions could be confused only if the judge allows sentencing concessions to be a part of plea bargaining. Many judges stressed that all of the above could happen but would not if the judge does his/her job properly.

QUESTIONS 17 & 18. Do you have a personal investment in plea bargaining? Do you obtain any benefit from plea bargaining?

ANSWER: About half of the judges said they had a personal investment in plea bargaining, most because of the time it frees up to meet other responsibilities. A few indicated that they would continue to support it until something better comes along.

QUESTION 19. Do you impose harsher sentences on defendants who go to trial?

ANSWER: Over two-thirds of the judges said that they did not punish defendants for going to trial. However, several judges said that stiffer sentences do sometimes occur because more information is often learned about the defendant and the crime at the trial than at a bargained plea.

QUESTION 20. Has plea bargaining taken judges out of the game because they no longer have much to say about the resolution of criminal cases?

ANSWER: More than half felt that judges were not "out of the game." Eleven felt that judges were out of it and fourteen said that judges could still be players if they did their jobs properly. But they were unclear as to how far they could go in light of "prosecutorial discretion" (which has something unclear to do with the constitutional separation of powers).

APPENDIX B

Questions to the District Attorneys and Lead Public Defenders in the Six Districts Studied and Their Responses

QUESTION 1. If plea bargaining were eliminated or sharply curtailed would there really be a substantial need for more trials?

ANSWER: Nine of the twelve said yes; three said no.

QUESTION 2. Could plea bargaining be substantially phased out without disabling the administration of justice?

ANSWER: Two said that it could be phased out; but ten said no, usually giving one of the following reasons: a) Plea bargaining works; it produces justice by, for example, providing a means to dampen legislative harshness; b) The system would grind to a halt without it.

QUESTION 3. Is plea bargaining inevitable? Would it occur through subtrafuge if it were eliminated or sharply curtailed?

ANSWER: Ten said it was inevitable; two said it was not.

QUESTION 4. Does plea bargaining give defense attorneys too much power to influence clients and thereby distort the traditional attorney-client relationship?

ANSWER: Nine said it did; two said that it did not; and one said sometimes.

QUESTION 5. How willing are prosecutors to bargain away sentencing enhancement charges, forego aggravated sentencing, or to avoid other legislative policy?

ANSWER: Ten said, "quite willing." Most of the defenders said that while prosecutors are willing to bargain away enhancement charges, judges usually are not willing to let them ignore aggravated sentencing statutes. All the defenders said that more habitual traffic offender charges could be filed. Three defenders said that prosecutors often appropriately avoid filing charges that would require aggravated sentencing. One defender complained that prosecutors do not treat similarly situated defendants equally.

QUESTION 6. Does plea bargaining occur because it gives defendants the impression that something is being done for them?

ANSWER: Five of the six district attorneys and four of the six defenders said yes. "We actually produce useful results through our plea bargaining."

QUESTION 7. Do you agree that plea bargaining promotes incompetence, laziness, favoritism and personal influence? Do some prosecutors plea bargain because they are afraid to go to trial or because they want to be liked or because they are not philosophically committed to the prosecutor's traditional role?

ANSWER: Most said no, a few answered yes, and one prosecutor thought it did and three defenders thought it did, sometimes.

QUESTION 8. Is plea bargaining a positive factor in the efficient and just resolution of cases?

ANSWER: All answered yes saying that it individualizes justice, avoids uncertainty, saves money, speeds justice and promotes uniformity.

QUESTION 9. Does plea bargaining pressure clients into giving up valuable rights in return for certainty of result? Such as the right to vigorous and zealous counsel, and the right to an official determination that there is evidence that could support a finding of guilt beyond any reasonable doubt? Does it produce too much leniency and thereby sacrifice some of society's rights such as having the punishment fit the crime?

ANSWER: Although six thought that rights could be lost in the process, most of those six did not think that it happened very often. One district attorney said that it was a defendant's free choice to give up rights, and two defenders said the rights were abstract and not that valuable in practice.

QUESTION 10. Does plea bargaining coerce the innocent or possibly innocent to plead guilty because the prosecution's offer may be too good to refuse?

ANSWER: One defender thought it did; one thought it did not; and the remaining four defenders thought it sometimes did.

QUESTION 11. Do district attorneys get enough money to try many of cases?

ANSWER: Five district attorneys and four defenders thought they did not get enough money; but two thought they did.

QUESTION 12. Are you aware of existing plea bargaining policies in your local district attorney's offices? Policies that inhibit, constrain or prohibit plea bargaining in certain situations.

ANSWER: Everyone except one defender said they were aware of "published" policies.

QUESTION 13. How much of a role does politics play in the continued maintenance of plea bargaining? Could prosecutors move away from it if they wanted to or does local politics maintain it?

ANSWER: Everyone except one district attorney thought that local politics played a substantial role in the continued maintenance of plea bargaining.

APPENDIX C

Chi Square Analysis

The table below presents a 6 × 6 array (six districts; six techniques) that looks at the difference between expected and observed frequency of use for each of the six plea bargaining techniques observed. If there were random use of the techniques then $X^2 = o$. If there were cohesive statewide policy in the use of techniques then $X^2 = 0$. The table, however, displays that use of techniques was dependent on individual preference. *LEGEND*: "Expected" frequencies were derived by dividing the sum of the total use of a technique in all districts by the number of districts (6).

Technique	District	Expected	Observed
DISMISSAL	3rd	8.92	13.00
	7th	14.24	8.00
	11th	11.45	18.00
	12th	8.25	8.00
	20th	16.90	16.00
	21st	14.24	11.00
DEFERRED JUDGMENT	3rd	12.17	11.00
	7th	19.44	20.00
	11th	15.62	15.00
	12th	11.26	13.00
	20th	23.07	13.00
	21st	19.44	9.00
ABANDONMENT OF CHARGES	3rd	16.03	10.00
	7th	25.60	26.00
	11th	20.57	14.00
	12th	14.83	15.00
	20th	30.38	38.00
	21st	25.60	30.00
REDUCTION OF CHARGES	3rd	15.18	25.00
	7th	24.25	31.00
	11th	19.49	11.00
	12th	14.05	22.00
	20th	28.78	13.00
	21st	24.25	24.00
GUARANTEED PROBATION	3rd	5.42	0.00
7th	8.66	11.00	
	11th	6.96	10.00
	12th	5.02	0.00
	20th	10.28	12.00
	21st	8.66	12.00
SENTENCING CAPS	3rd	9.28	8.00
	7th	14.82	11.00
	11th	11.91	18.00
	12th	8.59	4.00

20th	17.59	15.00
21st	14.82	21.00

VALUE OF THE CALCULATED CHI-SQUARE EQUALS 75.232
WITH 25 DEGREES OF FREEDOM. P = .001

HUNGER AND HOMELESSNESS IN AMERICA: A SURVEY OF STATE LEGISLATION

During the past decade, state governments have started to play an active role in enacting legislation on behalf of the homeless. Increased media attention, congressional hearings, and numerous studies and reports have heightened concern for these people.[1] Until recently, all relief was left to private sector service providers. The Reagan Administration's position has been that caring for the homeless is primarily the responsibility of private groups and local governments.[2] However, because of the increasing numbers of homeless people and the complex nature of this problem, private sector response has proven inadequate. In 1986, a survey of over 400 private and public sector agencies involved in serving the homeless was conducted in sixty cities across the country. Of the cities and localities surveyed, 84.7% indicated that private donations were insufficient to help them meet the increased needs of the homeless during winter.[3] The federal government recognized that more money and coordination of services for the homeless was needed. On July 22, 1987, the Stewart B. McKinney Homeless Assistance Act ("Act") was enacted to provide funds for emergency housing, nutrition, health care, and educational programs.[4] Recognizing that varying conditions across the country result in differing needs for the homeless, the Act was intended to supplement existing local efforts rather than establish new programs for the homeless.[5] State governments must become active in response to homelessness. Only through specific statutory provisions can the rights of the homeless be protected and effective solutions realized. Part I of this paper will describe the problems facing the homeless and explore its causes. Part II will examine federal and state government responses to homelessness. This section will review federal programs for the homeless[6] as well as state legislative enactments and explore why state governments must become more active.

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1. M. CUOMO, 1933-1983: NEVER AGAIN, REPORT TO THE NATIONAL GOVERNOR'S ASSOCIATION TASK FORCE ON THE HOMELESS, 3 (1983). Few can profess ignorance of the problem why in this land of conspicuous bounty Americans go hungry and homeless? *Id.*

2. R. SCHUSSHEIM, THE REAGAN 1987 BUDGET AND THE HOMELESS 8 (1986).

3. THE PARTNERSHIP FOR THE HOMELESS, BROKEN PROMISES/BROKEN LIVES: NATIONAL GROWTH IN HOMELESSNESS—WINTER 1987 3, 8 (1987). *See National Association of State Mental Health, Program Directors Conference* (1985) (homelessness is a generic social problem of increasing magnitude which can be resolved only through the coordinated efforts of governmental welfare, social, health, and mental health programs in conjunction with the private sector). *See also* U.S. CONFERENCE OF MAYORS, HOMELESSNESS IN AMERICA'S CITIES: TEN CASE STUDIES (1984) [hereinafter HOMELESSNESS IN AMERICA'S CITIES].

4. Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 481, 482 (1987).

5. *See infra* note 48 and accompanying text.

6. *See infra* notes 37-47 and accompanying text.

I. HOMELESSNESS

A. *Complexity of the Problem*

Today in America, more men, women, and children are homeless than at any time since the Great Depression. In city after city, town after town, record numbers of Americans lack even the basics: a bed to sleep in and a meal to eat. Today, in the richest nation on earth, growing numbers of Americans are engaged in a primitive struggle for survival.[7]

1. The Number of Homeless

Estimates on the number of homeless[8] in this country vary anywhere from 250,000 to 2.2 million. Factors used to document the number of homeless include: (1) requests for emergency shelter beds and food; (2) services provided to applicants for public assistance who list a shelter as their address or cannot furnish an address; (3) arrests and observations by police; (4) personal observation of the number of homeless on the streets; (5) actual efforts to count the homeless on the streets in specific areas of a city.[9] The transient nature of the population and the lack of stable housing from which to calculate those who are without adequate shelter give some indication as to why these numbers vary. The homeless may include disaster victims, political refugees, and migratory workers, all of whom are difficult to document in studies.[10] They are increasing at a rate of anywhere from 19.6%[11] to 25%.[12] Regardless of the statistics used, a substantial number of citizens in every state cannot afford decent housing.

2. Characteristics and Causes of Homelessness[13]

The typical homeless were once considered to be older white males

7. NATIONAL COALITION FOR THE HOMELESS, NATIONAL NEGLECT/NATIONAL SHAME, AMERICA'S HOMELESS: OUTLOOK—WINTER 1986-1987 (1986).

8. Many different definitions have been used to describe homelessness. The General Accounting Office defines the homeless as "those persons who lack resources and community ties necessary to provide for their own adequate shelter." GENERAL ACCOUNTING OFFICE, HOMELESSNESS: A COMPLEX PROBLEM AND THE FEDERAL RESPONSE 5 (1985). The National Governor's Association uses a restrictive definition of "persons or families who, on one particular day or night, have neither friends, family, nor sufficient funds which will provide for certain elementary resources they need to survive." M. CUOMO, *supra* note 1, at 15. The Stewart B. McKinney Act defines homeless to mean "an individual who lacks a fixed, regular, and adequate nighttime residence; and [includes] an individual who has a primary nighttime residence that is a supervised publicly or privately operated shelter designed to provide temporary living accommodations . . . ." Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, sec. 103, 101 Stat. 481, 485 (1987).

9. SCRUGGS, THE HOMELESS: BACKGROUND, ANALYSIS AND OPTIONS 2 (1985).

10. Snow, Baker, Anderson & Martin, *The Myth of Pervasive Mental Illness Among the Homeless*, 33 SOC. PROBS. 407, 408 (1986) [hereinafter *Myth of Mental Illness*].

11. THE PARTNERSHIP FOR THE HOMELESS, *supra* note 3, at 6. *See also* Freeman & Hall, *Permanent Homelessness in America*, 6 POPULATION RES. & POL'Y REV. 3 (1987) (which determined that even with economic recovery, the number of homeless continues to grow).

12. NATIONAL COALITION FOR THE HOMELESS, *supra* note 7, at 4.

13. These are characteristics based on national estimates which vary from region to region. *See infra* notes 26-34 and accompanying text.

suffering from alcoholism or drug addiction.[14] This is no longer the case.[15] Unlike the skid row derelicts who comprised the stereotypical street people in the 1960's, today's homeless population consists of many diverse groups of people including the mentally ill, evicted families, the elderly, alcoholics, drug addicts, minorities, veterans, and abused or abandoned children. Today, homeless families make up about one-third of the homeless population.[16] They are the fastest growing segment of the population.[17] Approximately one-fourth of the homeless are women. As many as one-third of the homeless population have attended college. Minorities may comprise up to 50% of the total homeless population.[18]

Contemporary theories concerning the causes of homelessness have developed throughout the last three decades.[19] In the 1960's and 1970's, changes in the treatment of the mentally ill resulted in many institutionalized people ending up on the streets of America.[20] It is estimated that as many as 50% of the homeless are mentally ill. Much of the blame for this large percentage has been directed at state mental health policies which had shifted emphasis on the treatment of the mentally ill away from institutionalization by cutting budgets rather than providing alternative living arrangements, and treatment of the mentally ill involved the use of psychotropic medication. This concept, known as deinstitutionalization, has contributed significantly to increased numbers of homeless people.

In the 1970's and 1980's, budget cuts in federal low-income housing assistance resulted in a scarcity of affordable housing. From 1977 to 1987, for example, federal housing assistance dropped from $28 billion to $7.5 billion.[21] Other factors have likewise contributed to the problem of homelessness—rising rents, utility cut-offs, the abandonment of unprofitable buildings and gentrification, where higher-income profes-

14. NATIONAL COALITION FOR THE HOMELESS, *supra* note 7, at 2. *See also* SCHILLMOELLER & SPAR, THE HOMELESS: OVERVIEW OF THE PROBLEM AND THE FEDERAL RESPONSE 1 (1987).

15. A national survey determined that the average age of homeless single adults dropped to 32.5 years. *See supra* note 3, at 11.

16. *See* Bassuk, Rubin & Lauriat, *Characteristics of Sheltered Homeless Families*, 76 J. PUB. HEALTH 1097 (1986).

17. Bassuk, *The Feminization of Homelessness: Families in Boston Shelters*, 7 AM. J. SOC. PSYCHIATRY 19 (1987).

18. SCRUGGS, *supra* note 9, at 3.

19. M. CUOMO, *supra* note 1, at 30.

20. DEPARTMENT OF HEALTH AND HUMAN SERVICES AND DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, REPORT ON FEDERAL EFFORTS TO RESPOND TO THE SHELTER AND BASIC LIVING NEEDS OF CHRONICALLY MENTALLY ILL INDIVIDUALS 3-4 (1985). A study in Austin, Texas indicated that only 16% of the homeless population were mentally ill. *See Myth of Mental Illness*, *supra* note 10, at 413. *See also* Robertson, *Mental Disorder Among Homeless Persons in the United States: An Overview of Recent Empirical Literature*, 14 ADMIN. MENTAL HEALTH 14 (1986).

21. NEW YORK CIVIL LIBERTIES UNION FOUNDATION, URBAN RIGHTS PROJECT 10-11 (1986). *See also* Christian Science Monitor, May 13, 1988, at 3, col. 2 (where Congress blames much of the current problem concerning the homeless on budget cuts in low-income housing subsidies); *Homelessness in America I: Hearing Before the Subcomm. on Housing, Banking, Finance and Urban Affairs, House of Representatives*, 97th Cong., 2d Sess. (1982).

sional people replace older, lower-income people in previously deteriorated inner-city housing. Increases in unemployment over the past twenty years have created more homeless families.[22] Increasing divorce rates suggest that single-parent families, left without the primary breadwinner, are also facing homelessness.[23]

As divorce rates climb, and the numbers of single mothers and teenage pregnancies increase, the homeless family population will continue to grow. A large majority of female heads of households are untrained and unskilled. When they are eligible for employment, they only qualify for jobs that do not pay enough to support a family. The combination of low income and exorbitant housing can make sustaining quality of life impossible for many single women with children.[24]

In the 1980's, there have been cuts in funding for Social Services programs which have also contributed to this problem.[25] The complexity of the homeless problem in this country suggests a need for effective state-government oversight.

B. *Local Variations of the Problem*

A national study conducted by the Department of Housing and Urban Development in 1984, and a number of local studies have all emphasized the diversity of the homeless population.[26] The highest per capita concentration of homeless people is found in the West, which has 19% of the nation's population but one-third of the homeless population. The South, on the other hand, has 33% of the nations population, yet only 24% of the total homeless.[27] Several states which have enacted legislation for the homeless have done so because they have found large numbers of people in their jurisdictions without shelter either because of a lack of affordable housing[28] or high levels of unemployment.[29] On the other hand, the New Jersey legislature found the rise of homeless

22. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HUD PROGRAMS AND SERVICES FOR THE HOMELESS UNDER THE STEWART B. MCKINNEY HOMELESS ASSISTANCE ACT 1 (1987). *See also* M. CUOMO, *supra* note 1, at 30.

23. *Homeless Families, A Neglected Crisis: Sixty Third Report by the Comm. on Government Operations, Together with Dissenting and Additional Views*, 99th Cong., 2d Sess. 4 (1986) [hereinafter *Homeless Families*]. One-third of homeless families had a personal crisis such as a dissolved relationship, incidences of beatings, death or illness. These factors are direct causes of their homelessness. *Id.*

24. *Id.*

25. M. CUOMO, *supra* note 1, at 30.

26. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 22, at 1. For example, in St. Louis, the homeless are predominantly families and half of the homeless are children. In 1983, 54% of the homeless households were single women with children. Murray, *The Homeless in the United States and in St. Louis*, 4 PUB. L. F. 455, 457 (1985). On the other hand, families represent 80% of the homeless in Yonkers, New York, but only 40% in Chicago and Boston. *Homeless Families*, *supra* note 23, at 8.

27. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 22, at 1.

28. CAL. GOV'T CODE § 15290 (West Supp. 1987); MD. ANN. CODE art. 400 § 14 (1986); N.J. STAT. ANN. § 55:13c-1 (West Supp. 1987); N.Y. SOC. SERV. LAW § 41 (McKinney 1987).

29. CAL. GOV'T CODE § 15290 (West Supp. 1987); MD. ANN. CODE art. 400 § 14 (1986).

victims of domestic violence results in an ever present need for emergency shelters.[30]

Cities are showing the diversity of the homeless population as well. For example, Boston, Chicago, Columbus, New York City, Salt Lake City, San Francisco and Seattle all report significant increases in the numbers of women and families with children.[31] Other cities indicate that unemployment was the biggest characteristic of the population.[32] Seattle and Salt Lake City, for example, identified lack of food and/or poor nutrition as the most serious issues facing the homeless, while Cleveland and Philadelphia identified problems relating to employment as their primary issues.[33] "To meet [these] goals . . . federal agencies, state and local governments, and dedicated private non-profit institutions will have to work together. By joining forces in public and private partnerships, we may hope to achieve far more than any agency or the public or private sectors of society could do alone."[34]

II. PART TWO

A. *The Federal Response: Requiring State Action*

As indicated in Part I, homelessness is a pervasive problem with many causes and much diversity. Because solutions are as complex as the problem,[35] homelessness must be approached at many levels.[36] Responding to this heightened concern regarding the number of homeless, and realizing that local governments and charitable organizations are finding it difficult to meet the calls for assistance, the 100th Congress approved major legislation to increase emergency services, housing,

30. N.J. STAT. ANN. § 52:27c-24 (West 1986).

31. *See* U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HOMELESS FAMILIES IN AMERICA'S CITIES: A 29-CITY SURVEY (1987).

32. For example, in Atlanta, 33% of the homeless are unemployed. HOMELESSNESS IN AMERICA'S CITIES, *supra* note 3 at 6.

33. U.S. CONFERENCE OF MAYORS, *supra* note 31, at 7.

34. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 22, at 1 (a message from the Secretary, Samuel R. Pierce).

35. The National Coalition for the Homeless, for example, has developed a three tiered approach. The first tier consists of short-term emergency services including beds, food, and medical services. The second tier consists of transitional or intermediate services, which provides living accomodations for individuals for up to six months while an individualized plan for permanent housing is implemented. The third tier provides for long-term permanent housing at low cost. Werner, *On the Streets: Homelessness Causes and Solutions*, 18 CLEARINGHOUSE REV. 11, 15 (1984).

36. CAL. GOV'T CODE § 15290 (West Supp. 1987). The California Legislature has recognized the complexity of the problem and the need for coordination in the various levels of government and the private sector. Relevant subsections of CAL. GOV'T CODE § 15290 include:

> (b) Federal, state, local, and private efforts to assist these homeless persons are not well coordinated and data concerning these shelterless persons are not kept in a consistent manner. (c) Local and state efforts to help homeless persons have not fixed overall coordination responsibility with individuals in either county or state government. (d) Existing programs providing homeless services to unsheltered residents, especially clients such as the elderly, displaced workers, juveniles, veterans, and the mentally ill do not adequately meet the needs of these persons.

See infra note 64 and accompanying text.

medical services, educational aid, and job training by enacting the Stewart B. McKinney Homeless Assistance Act.[37] The purpose of the Act is to fund programs to deal with the problem more effectively.[38] The language of the Act requires effective state involvement.

The Act provides $443 million in aid for fiscal year 1987, and $616 million in fiscal year 1988. It includes nearly twenty different provisions to address the needs of homeless people by providing for emergency shelter, food, health care, housing, educational programs, job training, and other services.[39] These programs are to be administered by several agencies which are monitored by the Interagency Council on the Homeless. Member agencies include: the Federal Emergency Management Agency ("FEMA"); the Department of Housing and Urban Development ("HUD"); the Department of Health and Human Services ("HHS"); and the Department of Agriculture ("USDA").[40]

The Emergency Shelter Grants Program, originally included in appropriations to HUD in 1987,[41] was included in the Stewart B. McKinney Act to make grants to states and local governments for the purpose of renovation, major rehabilitation, or conversion of buildings to be used as emergency shelters.[42] States and cities must develop and have approved a Comprehensive Homeless Assistance Plan ("CHAP") to participate in this program.[43] States must also provide matching funds.

The Supportive Housing Demonstration Program provides funding for transitional housing and supportive services for homeless persons capable of moving into independent living arrangements, and funding for permanent housing for homeless handicapped individuals. Funding is available to private nonprofit organizations, states, and local agencies.[44] Matching funds are also required for this program.[45]

The McKinney Act requires states to provide services to the homeless mentally ill. The McKinney Act provides assistance to states for

37. Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 481 (1987). *See* EDUCATION AND PUBLIC WELFARE DIVISION, CONGRESSIONAL RESEARCH SERVICE, THE HOMELESSNESS PROBLEM: BACKGROUND AND LEGISLATION 1 (Updated Aug. 19, 1987).

38. The purpose of the Stewart B. McKinney Act is:

> (1) to establish an Interagency Council on the Homeless, (2) to use public resources and programs in a more coordinated manner to meet the critically urgent needs of the homeless of the Nation, and (3) to provide funds for programs to assist the homeless, with special emphasis on elderly persons, handicapped persons, families with children, Native Americans, and veterans.

Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, sec. 102(b), 100 Stat. 481, 484 (1987).

39. *National Governors' Assn. Status of Programs Under the Stewart B. McKinney Homeless Assistance Act and Related Legislation* (April 2, 1988).

40. SCHILLMOELLER & SPAR, THE HOMELESS: OVERVIEW OF THE PROBLEM AND THE FEDERAL RESPONSE (CRS Report for Congress) (1987).

41. Provisions for this program were originally included in Supplemental Appropriation Bills: Related Agencies Appropriation Act 1987, Pub. L. 99-500, 100 Stat. 3341 (1986).

42. 42 U.S.C. § 11373 (Supp. 1987).

43. 42 U.S.C. § 11361 (Supp. 1987).

44. 42 U.S.C. § 11381-94 (Supp. 1987).

45. 42 U.S.C. § 11385 (Supp. 1987).

supportive and transitional housing for the homeless and mentally ill. States must provide 25% of the funding and agree that the money will be used to provide outreach and community mental health services for care and treatment.[46] The McKinney Act also requires the Department of Health and Human Services to conduct a study on the extent to which state deinstitutionalization policies have contributed to homelessness and to report to Congress recommendations that can reduce the number of chronically mentally ill persons who are homeless.[47]

The Stewart B. McKinney Act provides substantial funding in an effort to combat homelessness. The structure of the McKinney Act requires local and state governments to become active in coordinating and service providing capacities to ensure a comprehensive approach to solving the problem of homelessness.

B. *State Legislation*

"We do not want this to be a bill that absolves the States from their responsibilities, but we do want to be supportive to the work that they are doing, in helping them I think this [Act] is a bridge, a transition kind of program."[48] Federal money available from the McKinney Act is not designed to free local and state governments from their critical responsibility of meeting the needs of the homeless. Rather, the purpose of federal funding is to help state resources go further.[49] To date, fifteen states have enacted legislation for the homeless. The greatest potential for innovation in dealing with the problem rests with state legislatures.[50]

Enforcing the rights of the homeless in the courts is a recent phenomenon. Consequently, there are no significant precedents.[51] Litigation to require a right to shelter has been successful in only three states: New York; West Virginia; and New Jersey.[52] In all three cases, statutory

46. Pub. L. No. 100-77, sec. 611, 101 Stat. 481, 516 (1987).

47. 42 U.S.C. § 11301 (Supp. 1987).

48. 133 Cong. Rec. H5,922 (1987) (Statement of Mrs. Roukema, Co-sponsor of H.R. 558, the Stewart B. McKinney Homeless Assistance Act).

49. MIT CENTER FOR REAL ESTATE DEVELOPMENT, HOUSING AND THE HOMELESS (March 1988).

50. M. O'CONNOR, STATE LEGISLATIVE INITIATIVES FOR THE HOMELESS, (National Conference of State Legislatures) (January, 1986).

51. NATIONAL CLEARINGHOUSE FOR LEGAL SERVICES, INC., HOMELESSNESS IN AMERICA, A LITIGATION MEMORANDUM FOR LEGAL SERVICES ADVOCATES (1986).

52. Langdon & Kass, *Homelessness in America: Looking for a Right to Shelter*, 19 COLUM. J.L. & SOC. PROBS. 305, 306 (1985). The right to shelter in New York was established in *Callahan v. Carey*, N.Y.L.J., Dec. 11, 1979 (Sup. Ct. N.Y. Cty. 1979). The court required the city and state of New York to provide shelter to every homeless man who requested it. The court found authority for this under article xvii, sec. 1 of the New York State Constitution, sec. 62(1), 131(1) and 131(3) of the New York Social Services Law, and sec. 604.1(b) of the New York City Administrative Code. The New York State Constitution article xvii, sec. 1 provides: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions and in such manner and by such means as the legislature may from time to time determine." *See* Dakin, *Homelessness: The Role of the Legal Profession in Finding Solutions Through Litigation*, 21 FARN. L. Q. 93, 115 (1987). The right to shelter was later found to apply to women under equal protection grounds *Eldridge v. Koch*, 118 Misc. 2d 163, 459 N.Y.S.2d 960, *rev'd on other grounds*, 98 A.D.2d 675, 469 N.Y.S.2d 744 (1983).

authority was the basis for the right to shelter. For example, in *Hodge v. Ginsberg*,[53] the court held that homeless persons were entitled to shelter under a recently enacted chapter of the protective services laws. *Maticka v. Atlantic City*,[54] held a right to shelter existed under that state's protective services laws. The Constitution does not guarantee a right to shelter. What is needed is a large scale effort in the state legislature to secure shelter entitlements.[55]

This section will paint a picture of emerging legislative attempts which have specifically provided for the needs of the homeless and have begun to find solutions to homelessness through programs focusing on prevention, emergency services, data collection, and comprehensive approach strategies.

1. Prevention

New Jersey and Massachusetts have enacted legislation specifically focused on preventing homelessness.[56] The goal of the New Jersey Prevention of Homelessness Act is to prevent displacement of persons who face eviction and to establish less costly alternatives to the emergency placement of homeless households in temporary accommodations. Money from this program is provided to low-income families who are facing imminent eviction.[57]

2. Emergency Shelter and Other Services

States have enacted legislation for the homeless[58] primarily focusing on the need for shelter. Fourteen states have enacted legislation for the homeless which provide funding or regulate the habitability of emergency shelters.[59] New Jersey has a program which makes the state re-

53. 303 S.E.2d 245 (W. Va. 1983).

54. 216 N.J. Super. 434, 523 A.2d 416 (N.J. Super. Ct. App. Div. 1987).

55. Dakin, *Homelessness: The Role of the Legal Profession in Finding Solutions Through Litigation*, 21 FARN. L. Q. 93, 115 (1987).

56. MASS. GEN. LAWS ANN. ch. 450 (West 1987); N.J. STAT. ANN. § 52:27c-24 (West 1984).

57. PREVENTING HOMELESSNESS IN NEW JERSEY: REPORT ON THE FIRST YEAR OF OPERATION OF THE NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS HOMELESS PREVENTION PROGRAM 25 (1985). New Jersey law provides:

> (e) To provide rental assistance grants to persons of low or moderate income to enable them to pay the fair market value for housing units; (f) To provide loans and grants of temporary rental or other temporary housing assistance to persons without housing or in imminent danger of losing housing as a result of having insufficient income from other sources to allow payment of the rental or other housing costs.

N.J. STAT. ANN. § 52:27c-24 (West 1984).

58. California defines "homeless person" as "an individual who lacks the financial resources, mental capacity, or community ties needed to provide for his or her own adequate shelter." CAL. GOV'T CODE § 15292 (West Supp. 1987).

59. CAL. GOV'T. CODE § 15296 (West Supp. 1987); ILL. ANN. STAT. ch. 83-1382 (Smith-Hurd Supp. 1987); MASS. GEN. LAWS ANN. ch. 117, § 4 (West Supp. 1987); ME. REV. STAT. ANN. tit. 30, § 4601-A (1986 Supp.); MICH. COMP. LAWS ANN. § 400.14(a) (West 1987); N.J. STAT. ANN. § 53.13c (West 1988); PA. CONS. STAT. ANN. § 62 (Purdon 1987); WASH. REV. CODE ANN. § 43.185 (1987); W. VA. CODE § 31-18-3 (1985); WIS. STAT. ANN. § 46.97 (West 1988).

sponsible for insuring that these federal dollars, and all monies which provide assistance for shelters, are given only to facilities which are licensed and inspected by the state. This insures that shelters are safe, habitable and available to all residents of the state.[60]

3. Data Collection

Two states have initiated pilot programs to more effectively study the homeless problem in limited geographical areas.[61] California, for example, has established the Homeless Relief Pilot Project, designed to create a comprehensive plan for the coordinated delivery of existing state services in San Diego County.[62] Funds allocated for this program are for: (1) coordinating delivery of public and private sector services for the homeless; (2) collecting information regarding the number of homeless persons; and (3) ascertaining the unmet needs of the homeless. Funds under this program also facilitate direct services such as delivery of food, clothing, emergency shelter, and case management.[63] In 1988, the legislature was to receive a report on the status of this project and make recommendations.[64] Programs such as this allow states to clearly evaluate the extent of the unmet needs of the homeless within their jurisdiction.

4. Coordination and Oversight

Private service providers are not in a position to adequately coordinate their programs as effectively as states.[65] In Maryland, for example, the Department of Human Resources is responsible for policy determinations in administering shelter and nutrition services for the homeless. This state agency is also responsible for allocating federal and state funds for the homeless to areas of the state in consideration of the unmet needs and the number of homeless persons in those areas.[66]

5. Comprehensive Programs

Several states offer comprehensive programs. Massachusetts, for example, expanded its general relief assistance to the homeless. The state has increased emergency assistance benefits to Aid to Families with Dependant Children recipients by providing funds for up to thirty days in temporary shelter for homeless families.[67] The emergency assistance

60. N.J. STAT. ANN. § 55 (West 1987).
61. CAL. GOV'T CODE § 15291 (West 1987); MINN. STAT. ANN. § 268.38 (West 1987).
62. CAL. GOV'T CODE § 15293 (West 1987).
63. CAL. GOV'T CODE § 15294 (West 1987).
64. CAL. GOV'T CODE § 15300 (West 1987).
65. A few states have established programs which coordinate services for the homeless. *See* CAL. GOV'T CODE § 15294 (West 1987); ILL. ANN. STAT. ch. 12-4 para. 7 (Smith-Hurd 1987); MD. ANN. CODE art. 88a § 137 (1985); UTAH CODE ANN. § 55-22-1 (1987).
66. MD. ANN. CODE art. 88a § 137 (1985). *See also* source cited *supra* note 64 and accompanying text.
67. The Massachusetts Right to Housing Project is seeking to amend the Massachusetts Constitution by adding that all citizens have a right to occupy habitable and affordable non-transient housing.

program of the state was expanded to provide money to those who are at risk of being homeless. This includes funding for back rent, utility, and fuel bills for families facing eviction.[68] Maryland also has a comprehensive shelter, nutrition, and service program for homeless individuals which includes crisis and transitional shelter.[69] New York has enacted the Homeless Housing and Assistance Program which provides financial assistance for projects which are deemed necessary for homeless persons, and includes funding for social, medical and mental health services.[70] The Homeless Housing and Assistance Act provides funding for private non-profit and charitable organizations and public corporations to become involved in supplying shelter and other services to the homeless. Other provisions of the Homeless Housing and Assistance Act allow for contractual arrangements with private service providers in a variety of areas. This includes acquiring residential leases for the purpose of providing housing on an emergency basis to families with children who are in need of public assistance and care. It is this grass roots type of organization that gives states the flexibility needed to provide a variety of services to needy persons.

California has instituted a program in which a contractor may utilize funds allocated in the Assistance to Homeless Persons Act to provide loans for the first and last month's rent to individuals placed in employment.[71] New York has initiated legislation designed to increase the availability of housing for homeless persons,[72] and also provides for non-housing services such as dining, recreation, sanitary, social, and mental health services.

III. CONCLUSION

Poverty forms a culture, an interdependent system. In case after case, it has been documented that one cannot deal with the various components of poverty in isolation, changing this or that condition but leaving the basic structure intact. Consequently, a campaign against the misery of the poor should be comprehensive. The campaign should not be limited to a specific aspect of poverty but should strive to establish new communication, or substite a human environment for the inhuman one that now exists.[73]

This article has described the homeless problem as it exists in

68. THE COMMONWEALTH OF MASSACHUSETTS, EXECUTIVE DEPARTMENT, SUMMARY OF DUKAKIS ADMINISTRATION ACTIONS ON HOMELESS ACCOMPLISHMENTS (1987). The Executive Office of Communities and Development operates a program which provides counseling and assistance to landlords and tenants to help people stay in existing housing. Other programs administered by the state include emergency services for the medically ill, support services including case management for the chronically mentally ill and permanent housing services. *Id.*

69. MD. ANN. CODE art. 88a § 131 (1986).

70. N.Y. SOC. SERV. LAW § 41 (McKinney 1987).

71. CAL. GOV'T CODE § 15299 (West 1987).

72. N.Y. SOC. SERV. LAW § 312 (McKinney 1987).

73. M. HARRINGTON, THE OTHER AMERICA: POVERTY IN THE UNITED STATES 168 (1964).

America today. The homeless population is growing at a faster rate than ever before. The faces of the homeless are changing. Private service providers do not have the funding or the ability to attack the problem at the various levels necessary to effectively reduce the number of homeless people. What is needed is an integrated approach combining federal, state, and local governments with private service providers. Only fourteen states have enacted legislation thus far. All states must take an active role in the oversight and implementation of social policies regarding homelessness.

Do people have a right to life simply by reason of their humanity or citizenship? Put another way, shall we permit people to freeze to death in the winter, to starve, to die from the effects of preventable disease, merely because they are poor, insane, or addicted to drugs? In the long run, the ways in which our society responds to that fundamental question will determine far more than the plight of the homeless. It will define our civilization.[74] State legislators must act to protect the rights of the homeless to effectively solve this modern social problem.

Dave Furman
Mike McGurrin

74. Blasi, *Litigation on Behalf of the Homeless: Systematic Approaches*, 31 WASH. U.J. URB. & CONTEMP. L. 137 (1987).

FUNDAMENTALIST CHRISTIANS, THE PUBLIC SCHOOLS AND THE RELIGION CLAUSES

INTRODUCTION

Public education in the United States is under concerted attack by Fundamentalist Christians. The attacks range from attempts to remove books from public school libraries and classrooms, to opposition to the nature of the values and skills taught in the public schools, and even to charges of witchcraft being levelled at individual teachers.[1] There is a general perception among religious leaders,[2] educators,[3] and public interest groups,[4] that all references to Judeo-Christian religion have been removed from the curriculum of the public schools. An anecdotal illustration of this sort of omission is the allegation that history textbooks omit the quest for religious freedom from the list of reasons that the Pilgrims came to the New World.[5]

A federal case, initially brought in the Eastern District Court of Tennessee, *Mozert v. Hawkins County Public Schools*,[6] raises first amend-

1. *See, e.g.*, Mozert v. Hawkins County Public Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986); Board of Educ. v. Pico, 457 U.S. 853 (1982); EAGLE FORUM, THE STUDENT'S BILL OF RIGHTS (n.d.) [hereinafter STUDENT'S BILL]; G. Asakawa, *Closing the Book on Bennett*, 10 Westword 13 (1987); Hechinger, *What is Role for Education Department?*, N.Y. Times, Apr. 29, 1986; LaHaye, *Whose Ethics in the Government Schools?*, 23 KAPPA DELTA PI RECORD 72 (1987) [hereinafter LaHaye]; Jones, *Fundamentalists Enliven School Board Race*, Rocky Mountain News, July 20, 1986, at 22; McGraw, *Secular Humanism and the Schools*, The Heritage Foundation (1976); McGraw, *Teacher's Practices Based on Occult, Educator Says*, Denver Post, Mar. 20, 1987, at 2B; Tinsley, *Parents Found Guilty of Slandering Teacher*, Rocky Mountain News, Mar. 21, 1987, at 21.

2. Interview with Reverend Gilbert Horn, National Council of Churches (Apr. 10, 1987) [hereinafter Horn]; Interview with Ann Edelman, Anti-Defamation League of B'nai B'rith (Apr. 10, 1987).

3. P. Vitz, RELIGION AND TRADITIONAL VALUES IN PUBLIC SCHOOL TEXTBOOKS (National Institute of Education Study No. 6-84-0012, Project No. 2-0099, September, 1985) [hereinafter NIE Study]; ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT, RELIGION IN THE CURRICULUM (1987) [hereinafter ASCD REPORT]; Interview with Gail Mertz, Boulder County Safeguard (May 15,1987) [hereinafter Mertz]. Boulder County Safeguard is a branch of county government attached to the Boulder Valley School District which presents law-related programs to both students and teachers. Its employees are educators, not attorneys. Interview with Bruce Koranski, Staff Associate at the Center for Teaching International Relations, University of Denver (May 5, 1987) [hereinafter Koranski]. Interview with Barbara Miller, Ginnie Jones and Jackie Johnson, Social Science Consortium, University of Colorado (April 27, 1987) [hereinafter Miller].

4. PEOPLE FOR THE AMERICAN WAY, LOOKING AT HISTORY (1986) [hereinafter PAW STUDY]; LaHaye, *supra* note 1. People for the American Way ("PAW") is a special interest group opposed to conservative Christian challenges to public education.

5. Horn, *supra* note 2; Miller, *supra* note 3.

6. There are six opinions with the caption *Mozert v. Hawkins County Public Schools*. In order to avoid confusion, each opinion will be consistently referred to in the following short form: The first memorandum opinion is cited at 579 F. Supp. 1051 (E.D. Tenn. 1984) ("*Memorandum Opinion I*"); the second memorandum opinion is cited at 583 F. Supp. 201 (E.D. Tenn. 1984) ("*Memorandum Opinion II*"); the first Sixth Circuit decision is cited at 765 F.2d 75 (6th Cir. 1985) ("*Circuit Six I*"); the case on remand is cited at 647 F. Supp. 1194 (E.D. Tenn. 1986) ("*Remand Decision*"); and the second opinion of the Sixth Circuit

ment issues concerning establishment and free exercise of religion with regard to education of Fundamentalist Christian children in public schools.[7] In *Mozert,* the objections raised by the plaintiffs, Fundamentalist Christian parents and their children, highlight the concerns that Fundamentalist Christians have with the teaching of certain concepts, skills, and values as in the public schools of this country. These concerns are rooted in the sincere religious beliefs of the Fundamentalist Christians. If the public school system attempts to accommodate their demands and raise free exercise questions for reform, it must be aware of and avoid the possibility of violating the establishment clause by "favoring" religion.[8]

In our increasingly diverse society, we are faced with the question of whether there can be an adequate accommodation of the values-orientation held by every group with children enrolled in the public schools. Many educators believe that the public school system in this country teaches only such values as the need for timeliness, "good" work habits, and social cooperation, while at the same time engaging in a process of "values clarification"[9] which enables children to practice ethical problem-solving by applying values learned at home, in church, mosque, or synagogue to hypothetical problems raised in classroom discussions regarding readings from textbooks, newspapers, and magazines.[10] On the other hand, many professional educators believe that other values are taught in the schools and that many of these values are inappropriate.[11] Members of Fundamentalist Christian groups[12] and the Reagan Administration's Department of Education[13] believe that values education

Court of Appeals is cited at 827 F.2d 1058 (6th Cir. 1987) ("*Circuit Six II*"). *Certiorari* was denied by the United States Supreme Court at 108 S. Ct. 1029 (1988).

7. The religion clauses of the first amendment mandate: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

8. Supreme Court precedent suggests that government in the United States, whether federal, state or local, may neither favor nor oppose religion or non-religion. Governmental attempts to accommodate religious citizens' demands based on the Free Exercise Clause often raise questions of legality under the Establishment Clause. *See, e.g.*, Tushnet, THE CONSTITUTION OF RELIGION, 18 CONN. L. REV. 701 (1986); *The Tension Between the Free Exercise Clause and the Establishment Clause of the First Amendment*, 47 OHIO ST. L.J. 289 (1986) [hereinafter *Tension*]; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 812 (2d ed. 1978) [hereinafter TRIBE].

9. Values clarification is supposed to be a neutral means of helping students understand their own values. Miller, *supra* note 3. For a full discussion of the methodology and theory of values clarification see *infra* notes 185-191 and accompanying text.

10. Miller, *supra* note 3.

11. *See, e.g.*, THE HIDDEN CURRICULUM AND MORAL EDUCATION (Giroux & Purpel ed. 1983) [hereinafter HIDDEN CURRICULUM]. *See also infra* notes 186-193 and accompanying text.

12. *See* LaHaye, *supra* note 1; STUDENT'S BILL, *supra* note 1.

13. *See* CUNNINGHAM, BLOWING THE WHISTLE ON "GLOBAL EDUCATION" (n.d.) (report prepared for Thomas G. Tancredo, Regional Representative, Region VIII, U.S. Dept. of Education) [hereinafter CUNNINGHAM]; Address by G.L. Bauer, Secretary of the United States Deptartment of Education, *Association of American Publishers* Annual Meeting (Jan. 1986); Finn, *Decentralize, Deregulate, Empower*, POLICY REVIEW 58 (Summer 1986). Mr Finn was Assistant Secretary for Research and Improvement, United States Department of Education, at the time he wrote this article. Mr. Finn published a number of articles touting the voucher system for funding education in the United States. This system would have

should reflect more traditional "Judeo-Christian" viewpoints. One Fundamentalist Christian special-interest group, Concerned Women for America (CWA), which represents the plaintiffs in the *Mozert* case, has stated its goal:

> Concerned Women for America hopes to educate Americans on the pernicious philosophy and effects of Secular Humanism. We would like to see Secular Humanism thrown out of the government schools and biblical morality restored. Meanwhile, CWA will continue to defend the rights of parents and children to opt out of classes offensive to their beliefs. It is clear that secular humanism has only resulted in poor academic standards, a breakdown of decency, and total ignorance about the Christian roots of America.[14]

This is not the first struggle over the religious content of curriculum in the public schools. Such conflicts have occurred from the very beginnings of public education in the eighteenth century[15] and from time to time since then.[16] Struggles over the public school curriculum are seen by some as a process of adapting the fundamental tenets of an "American Civil Religion" to demands of religious groups for accommodation of their beliefs.[17]

The objective of this note is to examine the nature of the values taught, the manner in which they are taught, and who shall determine which values will be taught in the public school systems of the United States. The *Mozert* case will serve as a focus for these issues. Furthermore, this note will trace the history of education and the values taught in the public schools from colonial days, through the nineteenth century which saw the inception of universal free public education, into the present time. Lastly, this note will consider whether the Fundamentalist Christian challenge is well-founded in light of the religion clauses of the first amendment and Supreme Court precedent regarding both the place of religion in the public schools and the relative roles of parents and educators in determining the curriculum presented by the public schools of this nation.

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state and local governments issue vouchers to all parents with children of school age. The vouchers would be used to finance the education of children in schools of their choice as well as their parent's choice, whether those schools would be "public," private or parochial. *See* Rosen, *Voucher System Would Raise Quality in Our Public Schools*, Denver Post, June 20, 1984; D. Lee, *The Uncertain Prospects for Educational Vouchers*, THE INTERCOLLEGIATE REVIEW 29 (Spring 1986); J. McLaughry, *Who Says Vouchers*, REASON 24 (January, 1984); S. Taichi, *Supply-Side Competition for the School System*, XI JAPAN ECHO 38 (1984); M. Lieberman, MARKET SOLUTIONS TO THE EDUCATION CRISIS (1986) (Policy Analysis No. 2, CATO Institute, Washington, D.C.). At least one Denver-area educator believes that the conservative Christian challenges to the schools are brought with the goal of arousing enough dissatisfaction with the public schools that the voucher system would be implemented.

14. LaHaye, *supra* note 1, at 74-75.

15. L. WRIGHT, CULTURE ON THE MOVING FRONTIER 60 (1955) [hereinafter WRIGHT].

16. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925) *Pierce* involved the legality of private education in Oregon, both secular and sectarian, in the face of a law providing for compulsory attendance in public schools. The Court held that the state's interest in educating its citizens could be fulfilled by such private education.

17. *See infra* notes 168-185 and accompanying text.

Tennessee's Educational Program

Determined to provide better education for its resident children, Tennessee adopted a Better Schools Program in 1983. Tennessee has committed to significant expenditure of state funds to implement this program and for public education generally.[18] An essential part of the Better Schools Program is the Basic Skills First Program, which emphasizes certain skills in reading and mathematics which are to be taught sequentially in an integrated curriculum from kindergarten through eighth grade. The state of Tennessee considers the reading curriculum to be the heart of both the Basic Skills First Program and elementary education. Specific curriculum objectives are identified in this program and all public schools in Tennessee are required by law to adopt it and to achieve its objectives.[19]

In *Mozert*,[20] the defendants, the Hawkins County Public Schools and school officials, assert that critical reading is an important part of any reading program.[21] It helps to develop higher order cognitive skills, enabling students to evaluate material they have read, to contrast ideas presented, and to understand complex characters portrayed in reading materials. Critical reading leads to critical thinking, a skill considered by Tennessee to be essential to good citizenship. Tennessee "schools seek to teach students to be autonomous individuals, who can make their own judgments about moral questions."[22] In order to develop autonomous students, Tennessee, in its reading program, seeks to expose students to "real life," morally ambiguous situations in which characters act both acceptably and unacceptably in light of general societal standards. By discussing the characters' actions, students can learn vicariously the results of inappropriate as well as appropriate values decisions.

Another goal of Tennessee's educational program is to teach appreciation of the value of tolerance, an essential part of education in a pluralistic society. To learn tolerance, defendants argue, it is necessary to expose students to a broad range of religious and social beliefs. Controversial contemporary topics, such as feminism and various personal and family problems, are presented in order to help prepare students for

18. *See* Brief of Appellants, Mozert v. Hawkins County Pub. Schools, 827 F.2d 1058 (6th Cir. 1987) (Nos. 86-6144, 86-6179 and 86-6180) [hereinafter Brief for Appellant Schools]. The Brief for Appellant Schools sets out the goals of Tennessee's public education program and the means it has chosen to accomplish them. *Id.* 1-8. The brief asserts that Tennessee devotes more than half of its annual statewide expenditures to education. *Id.* at 2.

19. Tenn. Admin. Reg. 0520-6-1, 0520-6-4 (1987).

20. Specifically, the plaintiffs are the Fundamentalist Christian parents and their children whose attorneys subsequently drafted the "Brief of Appellees." The defendants, whose attorneys subsequently drafted the "Brief of Appellants," are the Hawkins County Public Schools and school officials, including the Commissioner of Education of the State of Tennessee.

21. Brief for Appellant Schools, *supra* note 18, at 3.

22. *Id.* at 4.

dealing with similar problems, as well as public controversies, which may at some time have an impact on their own lives.

Another educational technique claimed by defendants to be essential in implementing Tennessee's educational reform involves engaging students in subject matter by presenting and discussing controversial issues which are likely to pique their interest. Tennessee schools develop students' imaginations through presentation of magic in classical children's stories and through role-playing.

These important skills and values (i.e., critical thinking and tolerance) are taught in an integrated curriculum including courses in science, social studies, history and literature, as well as in reading class. The basal reader is considered to be a necessary part of the schools' teaching tools because it helps to determine what skills are taught and presents those skills in a sequence which facilitates learning.[23] Tennessee's overall goal in providing for a curriculum emphasizing development of the skills and values discussed above is the development of good citizens who can actively participate in modern society.

Tennessee requires all public schools to use textbooks selected from a state-approved list.[24] In 1982, the State Textbook Commission, after receiving advice from public school teachers, state educational consultants and the general public, developed a list of books approved for use in developmental reading classes.[25] The Holt, Rinehart and Winston basal reading series (the "Holt series") was selected from the state-approved list by a committee of Hawkins County reading teachers in 1983, partly because it contains award winning literature which the teachers believed would stimulate students' interest.

The goals, concepts, skills and values of Tennessee's public school curriculum and the methods chosen to implement them are consistent with current educational theories and practices.[26] Plaintiffs, who are Fundamentalist Christians, challenged the authority of Tennessee to mandate this curriculum because it allegedly violated their right to free exercise of their religious beliefs.

Lines of Conflict Drawn

In late August, 1983, less than a month after the Holt series had been introduced into the Hawkins County public schools, Rebecca Frost, a sixth grader, asked her mother, Vicki Frost, for help with her reading homework. The story Rebecca was reading dealt with mental telepathy; Mrs. Frost had religious objections to mental telepathy.[27]

23. *Id.* at 7. Basal reader series include not only a set of textbooks developed for use in the elementary and middle grades but supplementary materials often introduced by teachers. *Id.* at 7, n.36.

24. TENN. CODE ANN. § 49-6-2206 (1983).

25. Brief for Appellant Schools, *supra* note 18, at 8.

26. *See infra* notes 94-157 and accompanying text.

27. Brief for Appellee Parents at 3, Mozert v. Hawkins County Public Schools, 827 F.2d 1058 (6th Cir. 1987) (Nos. 86-6144, 86-6179 and 86-6180) [hereinafter Brief for Appellee Parents].

Mrs. Frost examined the Holt series further and then communicated her concern about the readers to Hawkins County school officials and other similarly minded parents.[28] The parents' concern focused on concepts, values, and teaching methods objectionable to them due to their religious beliefs. Plaintiff parents and their children belong to different churches and their beliefs are personal, not derived from the stated doctrine of any of their congregations. The appellate brief submitted on behalf of the parents and their children sets out their objections.[29] In September, 1983, a group of Hawkins County residents, including most of the plaintiffs, formed an organization which lobbied at regularly scheduled school board meetings, objecting to the use of the Holt series and seeking removal of those textbooks from the schools.[30] During this time, plaintiffs also requested that alternative reading programs be provided by the Hawkins County schools for their children.[31] Such alternative programs were established at one middle school and two elementary schools.[32]

At a meeting held on November 10, 1983, the Hawkins County School Board unanimously decided, without discussion according to plaintiffs, to require teachers to use only textbooks adopted by the Board of Education as regular classroom textbooks.[33] Plaintiffs implicitly characterize the school board's decision as uninformed and closeminded, citing statements by various members of the school board and local "mainstream" clerics that the school board had evaluated the Holt series in light of their own religious beliefs and had found no personal objections to it. Plaintiffs further alleged that only one school board member *may* have spoken with *any* school official before voting to cancel the alternative reading programs. The appellate brief filed on behalf of the parents asserted that the school board rejected every proposal made for an alternative reading program and quotes testimony from the trial on remand:

The board should have taken a harder line against [the par-

28. *Id.*; Brief for Appellant Schools, *supra* note 18, at 10.

29. Brief for Appellee Parents, *supra* note 27, at 10-24. *See infra* notes 41-49 and accompanying text for further discussion of the parents' objections to the Holt series. The objections include a familiar litany of problems that Fundamentalist or Conservative Christians have with concepts and values taught in the public schools of this country. In the ever increasingly diverse society in which we live, the question is whether there can be an adequate accommodation of the values orientation of every group with children in the schools. Many educators believe that the public school system in this country teaches only neutral values while at the same time engaging in a process of "values clarification" to reinforce values learned at home and in church. For a further discussion of these ideas see *infra* notes 170-77 and accompanying text.

30. *Remand Decision*, 647 F. Supp. 1194, 1196 (E.D. Tenn. 1986).

31. *Id. See* Brief for Appellant Schools, *supra* note 18, at 17; Brief for Appellee Parents, *supra* note 27, at 3.

32. *Remand Decision*, 647 F. Supp. at 1196; Brief for Appellant Schools, *supra* note 18, at 17-18; Brief for Appellee Parents, *supra* note 27, at 3-4. Eight or nine children participated in these alternative programs which lasted approximately six weeks.

33. *Remand Decision*, 647 F. Supp. at 1196; Brief for Appellant Schools, *supra* note 18, at 18; Brief for Appellee Parents, *supra* note 27, at 5. Appellants merely state that the board rejected the alternative reading programs without addressing whether there had been discussion of the topic at the meeting.

> ents]. If we had taken a hard nosed attitude to begin with, I mean a real hard nosed attitude, it wouldn't have gone this far. The case would have ended up in federal court, but the board wouldn't have had to listen to these people for four or five meetings. I listened patiently, I thought all they wanted was to be heard. Everything they did had a purpose, they provoked you to do what they wanted and then they cry wolf. If you give them an inch, they want a mile.[34]

Plaintiffs also cite the deposition of the Superintendent of the Hawkins County Public Schools in 1983 as stating that "forcing the children to read material that violated their religious beliefs would build character and develop self-discipline."[35] This same Superintendent's beliefs about the importance of the Holt series in the educational process is quoted in the opinion of the Sixth Circuit Court of Appeals which reversed and remanded the District Court's holding.[36]

The schools complied with the school board's order, informing the students and their parents that alternative reading programs would no longer be provided and that the students would be required to attend the regular reading program and use the Holt series books.[37] Seven middle school students refused to participate in the regular reading program on religious grounds and were initially suspended for three days.[38] Later, these same students were suspended for ten more days for the same reasons. Two of these students were suspended a third time for an additional ten days.[39] After the suspensions, and despite the school board's resolution, two students continued in alternative reading programs, one continuing into early 1984 and the other for the remainder of the school year.[40]

The plaintiffs' first appellate brief asserted that local school officials attempted to stir up sentiment against the families objecting to the Holt series. At a PTA meeting, held at Church Hill Elementary School on December 5, 1983, an announcement was handed out. It read in part:

> As principal of your school and a mother, I now feel that we must stand for your child's rights. It is not appropriate for a few local people controlled by outside sources to try to impose their beliefs on all, and be allowed to disrupt the education of our boys and girls in Church Hill.[41]

Other allegations regarding school officials creating opposition to the plaintiff parents are raised in the parents' appellate brief. These allegations included the fact that the superintendent of the school board and a teacher in a public school addressed a PTA meeting about the textbook

34. Brief for Appellee Parents, *supra* note 27, at 8 (quoting the testimony given by Harold Silver, Chairman of the Hawkins County School Board, during the trial on remand).

35. *Id.* (quoting the deposition of Bill Snodgrass).

36. *Circuit Six I*, 765 F.2d 75,76 (6th Cir. 1985).

37. *Remand Decision*, 647 F. Supp. at 1196.

38. *Id.*

39. Brief for Appellee Parents, *supra* note 27, at 7.

40. *Id.* at 9-10; Brief for Appellant Schools, *supra* note 18, at 18.

41. Brief for Appellee Parents, *supra* note 27, at 10.

selection process. Further allegations stated that a juvenile court judge helped to form a group called "CARE," which opposed parents who objected to the textbooks. The judge also allegedly threatened to arrest children who refused to use the Holt series. Finally, the parents alleged that the author of the announcement quoted above and another public school principal in the county had written letters, which incorporated materials supplied by People for the American Way, to the editor of a local newspaper.

Discussion

It appears from the allegations in the briefs filed in this litigation that both parties started with the good intention of asserting their beliefs about the proper goals and procedures for educating the children of Hawkins County. However, in the heat of highly emotional debate, both sides seem to have lost their objectivity and to have acted questionably. The end result was a power struggle for control of the public schools of Hawkins County which was carried into the court system because neither side could compromise after their positions polarized and hardened.

THE PARENTS' RELIGIOUS OBJECTIONS TO THE HOLT SERIES

Vicki Frost reviewed the Holt series and produced a 212 page document setting out her objections to it. In the brief of the appellees, the Fundamentalist Christian parents and their children, these objections were distilled to include sixteen themes. The major concern of the parents in this case, was that the Holt series presented a one-sided view of the world which excluded their religious beliefs and values.[42] This aspect of the parents' case is supported by a study conducted by the National Institute of Education.[43] Testimony, by the author of that study at the trial on remand, suggests that the Holt series contains a pervasive bias against the religious beliefs of the plaintiffs which stems from both omission and denigration of Judeo-Christian values. According to the appellees' brief, no single story in the Holt series standing alone would have caused the parents "to draw the line"[44] that they feel the schools could not cross without violating their right to free exercise; however, the lack of balance in the Holt series does cross the parents' line and raises first amendment questions. The appellees' brief states that they do not object to mere exposure of their children to ideas contrary to their Fundamentalist Christian beliefs but rather to the constant barrage of such themes without a balancing presentation of "traditional" Ameri-

42. *Id.* at 11-13, 26-33.

43. *Id.* at 26-33. *See also* PAW STUDY, *supra* note 4. PAW has conducted a study of religion in public school textbooks which also supports this argument. A study conducted by a liberal public interest group, AMERICANS UNITED FOR SEPERATION OF CHURCH AND STATE, TEACHING ABOUT RELIGIOUS FREEDOM IN AMERICAN SECONDARY SCHOOLS (1985) [hereinafter AU STUDY] supports Appellees' lack of balance argument.

44. Brief for Appellee Parents, *supra* note 27, at 51. *See also* Thomas v. Review Bd., 450 U.S. 707, 715 (1981).

can Christian values. Nor do the parents demand that the public schools teach their religious beliefs to all children. Rather, the plaintiff parents' demand is for the schools to teach in such a way as not to offend or denigrate their Fundamentalist Christian beliefs. Vicki Frost testified on remand:

> I can deal with small offenses but when you come over to burden and continuously over and over and over story after story after story, with virtually nothing to counteract that or nothing to balance that from, you know, from our religious viewpoint, you're proving my point, very well about offense and burden. Something can be a little offensive and you tolerate it but there comes a point where toleration moves to burden.[45]

According to Bob Mozert:

> [T]he families derive their religious beliefs from the entire Bible, and [believe] that they could not violate any [b]iblical teaching. For them to disobey a [b]iblical command would result in spiritual or physical punishment. . . . The children from these families also could not merely study the Holt books that violate their religious beliefs, even if the children were not forced by school officials to believe the ideas expressed in the readings. . . . [S]tudying these religiously offensive materials violates the Bible, which says 'learn not the ways of the heathen,' and, 'have no fellowship with the unfruitful works of darkness, but rather reprove them, for it is shameful even to mention what the disobedient do in secret.'[46]

Many themes in the Holt series were found to be biblically forbidden by the parents and these objections were set forth in their brief. Such themes specifically included: futuristic supernaturalism ("man as God"), evolution, humanism (using "man as the measure of all life"), one world government ("syncretism"), contrasting belief in the supernatural with science, situational ethics, values clarification, magic, denial that there is life after death, teaching that heaven and hell do not exist, teaching that all religions are merely different roads to God, skeptical portrayal of religion, pacifism, elimination of sexual roles, reversal of sexual roles, and questioning authority, including that of parents.

Defendants characterized the plaintiffs' objections in a manner similar to that of both the court and the plaintiffs; however, defendants couched the objections in such a way as to emphasize the conflict between the parents' values and the objectives of the Tennessee public schools.[47] For example, defendants stated plaintiffs' objections to the process of "values clarification" as follows:

> The plaintiffs . . . object to the exploration of moral dilemmas in stories and to their children being exposed to views on many complex issues. They do not want a teacher to ask their chil-

45. Brief for Appellee Parents, *supra* note 27, at 40.

46. Brief for Appellee Parents, *supra* note 26, at 14 (quoting *Jeremiah* 10:2 and *Ephesians* 5:11-12, respectively).

47. Brief for Appellant Schools, *supra* note 18, at 14-17. *See supra* notes 6-14 and accompanying text for a discussion of those objectives.

> dren to understand how a character in a story feels or to apply their values to a story in order to decide whether a character in a story did the right thing.[48]

The parents' objections to the material presented by the Holt series and the response of the Hawkins County Public School system will serve as the focus of this paper. The plaintiff parents' objections are essentially the same as those raised by Fundamentalist Christians throughout the United States over the last several years.[49] The response of the school board and officials is not atypical. This struggle over curriculum poses constitutional questions as to who will control the public schools of this country—parents, professional educators, or the courts.

PROCEEDINGS IN THE CASE

Tennessee Eastern District Court Summary Judgment Holdings

The plaintiffs and their children filed a civil rights action on December 2, 1983.[50] They sought injunctive relief to provide reading programs alternative to the Holt series as well as money damages, alleging violation of both their first amendment right to free exercise and the fundamental right of parents to control the education, as well as religious and moral instruction of their children. The case proceeded through two memorandum opinions which resulted in dismissal by the Eastern District Court of Tennessee in 1984. An appeal went to the Sixth Circuit Court of Appeals in 1985 resulting in a reversal and remand. A memorandum decision was entered on remand in 1986. A second appeal went to the Sixth Circuit in 1987. Certiorari was denied by the United States Supreme Court in 1988.

In the first memorandum opinion the court stated plaintiffs' position as:

> [T]heir First Amendment freedom to believe as they choose is meaningless if the state can force their children to read books that contain ideas and values to which they do not subscribe. . . . The complaint contains no allegation that the defendants are attempting to coerce the school children into performing any symbolic act, subscribing to any particular value, or professing any particular form of belief. The plaintiffs' assertion appears to be that the mere *exposure* to this broad spectrum of ideas and values which they find offensive amounts to a constitutional violation.[51]

The court held that only one claim, which alleged that the Holt series teaches that one does not need to believe in God in a specific way but that any faith in the supernatural can lead to salvation, may have stated a violation of plaintiffs' constitutional right to free exercise. This would be so only if the Holt series "appear[s] to assert that salvation or some form

48. Brief for Appellant Schools, *supra* note 18, at 11.

49. *See infra* notes 84-91 and accompanying text.

50. The plaintiffs' action was based on 42 U.S.C. § 1983 (1982).

51. *Memorandum Opinion I*, 579 F. Supp. 1051, 1052 (E.D. Tenn. 1984) (emphasis added).

of religion is necessary at all or that no religion is necessary."[52] The court found that plaintiffs had not specified which parts of the Holt series would substantiate their claim. Citing *Williams v. Board of Education*,[53] the court held that there was no constitutional right protecting "plaintiffs from *exposure* to morally offensive value systems or from exposure to antithetical religious ideas."[54] Consequently, the court partially granted and partially denied defendants' motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure, and required the plaintiffs to substantiate their allegations regarding the one possible constitutional claim.

After plaintiffs presented specific citations to those parts of the Holt series which allegedly taught that one does not need to believe in God in a specific way but that any type of faith in the supernatural is an acceptable method of salvation, the district court rendered its second memorandum opinion.[55] The court again cited *Williams* for the proposition that the first amendment does not guarantee religious freedom from exposure to ideas and stated that "[w]hat is guaranteed is that the state schools will be neutral on the subject, neither advocating a particular religious belief nor expressing hostility to any or all religions."[56] Finding that the Holt series "carefully adopt[s] this constitutionally mandated neutrality,"[57] the court dismissed the case.

On appeal, the Sixth Circuit stated the standards to be used in deciding free exercise claims:

> [C]ourts apply a two-step analysis. First, it must be determined whether the government action does, in fact, create a burden on the litigant's exercise of his religion. If such a burden is found, it must then be balanced against the governmental interest, with the government being required to show a compelling reason for its action.[58]

In analyzing the parties' cases, the Sixth Circuit noted the parents' assertions that their sincerely held religious beliefs were violated by exposure to the Holt series and that refusal to participate in the offensive reading program would lead to expulsion of their children from the Hawkins County Public Schools thereby denying them a government benefit because of their religious beliefs. Defendants' denial that the parents' religious beliefs were sincerely held and that mere exposure to the Holt series could offend such beliefs raised material issues of fact and law, thus making the district court's dismissal improper. Further, defendants alleged that their interest in teaching reading to elementary school students in the system was a compelling state interest justifying infringement of the plaintiffs' free exercise rights and that accommodat-

52. *Id.*
53. 388 F. Supp. 93 (D.W. Va. 1975), *aff'd*, 530 F.2d 972 (4th Cir. 1975).
54. *Memorandum Opinion I*, 579 F. Supp. at 1053 (emphasis added).
55. *Memorandum Opinion II*, 582 F. Supp. 201 (E.D. Tenn. 1984).
56. *Id.* at 203.
57. *Id.*
58. *Circuit Six I*, 765 F.2d 75, 78 (6th Cir. 1985) (citations omitted).

ing the demand for alternative reading programs would be a violation of the establishment clause. The plaintiffs countered this allegation and claimed that their proposal for alternative reading programs would not impair the schools' ability to teach reading. The Sixth Circuit found that these assertions also raised significant issues of law and fact and reversed the dismissal by the district court, remanding the case for resolution of these issues.

On remand, Chief Judge Hull noted the importance of this case:

> This action juxtaposes two of our most essential constitutional liberties—the right of free exercise of religion and the right to be free from a religion established by the state. Moreover, it implicates an important state interest in the education of our children. The education of our citizens is essential to prepare them for effective and intelligent participation in our political system and is essential to the preservation of our freedom and independence.[59]

Judge Hull quoted the standard of review required by the Sixth Circuit and added that "it must be determined whether the state has acted in a way which constitutes 'the least restrictive means of achieving [the] compelling state interest,' as measured by its impact upon the plaintiffs."[60] Threshold issues in determining whether free exercise rights have been impermissibly burdened involve the determination of whether the beliefs asserted to be violated are religious and whether they are sincerely held by those asserting them.[61] In the instant case, these facts were stipulated by the parties. An assertion by the schools that the religious beliefs allegedly burdened must be "central to the plaintiffs' faith" before they are entitled to first amendment protection was rejected by Judge Hull as being based on dicta from the cases cited.[62] Judge Hull then agreed with the parents' assertion that the Holt series lacked balance in its presentation of values:

> It appears to the court that many of the objectionable passages in the Holt books would be rendered inoffensive, or less offensive, in a more balanced context. The problem with the Holt series, as it relates to the plaintiffs' beliefs, is *one of degree*. One story reinforces and builds upon the others throughout the individual texts and the series as a whole. The plaintiffs believe that, after reading the entire Holt series, a child might adopt the views of a feminist, a humanist, a pacifist, an anti-Christian, a vegetarian, or an advocate of a 'one world government.'
>
> Plaintiffs sincerely believe that the repetitive affirmation of these philosophical viewpoints is repulsive to the Christian faith—so repulsive that they must not allow their children to be exposed to the Holt series. This is their *religious* belief. They

59. *Remand Decision*, 647 F. Supp. 1194, 1195 (E.D. Tenn. 1986) (citations omitted).

60. *Remand Decision*, 647 F. Supp. at 1197 (quoting Thomas v. Review Bd., 450 U.S. 707, 718 (1981)).

61. Judge Hull cited Wisconsin v. Yoder, 406 U.S. 205 (1972) and United States v. Seeger, 380 U.S. 163, 185 (1965).

62. *Remand Decision*, 647 F. Supp. at 1198.

> have drawn a line, 'and it is not for us to say that the line [they] drew was an unreasonable one.'[63]

Judge Hull turned to *Thomas v. Review Board*[64] for the test to determine whether the state's action burdened plaintiffs' right to free exercise of their religion. "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief . . . a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."[65] The court then considered the precedents, which included *Thomas*, *Sherbert v. Verner*,[66] *Spence v. Bailey*,[67] and *Moody v. Cronin*.[68] Both *Thomas* and *Sherbert* were cases based on denial of unemployment benefits to persons who lost their jobs because of refusing to work in certain situations for religious reasons. In both cases, the Supreme Court held for the religionists on the basis of the Free Exercise Clause. In the two lower court decisions, school children had refused to participate in certain classes because of their religious beliefs. In both cases the courts found that denial of diplomas, suspension, expulsion, and other punishments constituted infringement of the right to free exercise. In light of these cases, Judge Hull found that the Hawkins County School Board had "effectively required that the student-plaintiffs either read the offensive texts or give up their free public education" thus denying them a government benefit on the basis of their religious beliefs and violating their right to free exercise.[69]

The court looked again to *Thomas* for the standard to determine whether this burden on the parents' and students' right to free exercise of their religion was justified by a compelling state interest.

> The mere fact that the [plaintiffs'] religious practice is burdened by a government program does not mean that an exemption accommodating [their] practice must be granted. The state may justify an inroad on religious liberty [only] by showing that it is the least restrictive means of achieving some compelling state interest.[70]

Judge Hull found that "[p]roviding public schools ranks at the very apex of the function of a state."[71] The ultimate issue in this case, in the eyes of Judge Hull, is whether Tennessee, acting through its local school board in Hawkins County, "can achieve literacy and good citizenship for all students without forcing them to read the Holt series."[72] Based on

63. *Id.* at 1199 (emphasis added) (citations omitted).
64. 450 U.S. 707 (1981).
65. *Remand Decision*, 647 F.Supp. at 1199 (quoting Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981)).
66. 374 U.S. 398 (1963).
67. 465 F.2d 797 (6th Cir. 1972).
68. 484 F. Supp. 270 (C.D. Ill. 1979).
69. *Remand Decision*, 647 F. Supp. at 1200.
70. *Id.* (quoting Thomas v. Review Bd., 450 U.S. 707, 718 (1981)).
71. *Id.* (quoting Wisconsin v. Yoder, 406 U.S. 205, 213 (1972)).
72. *Id.* at 1201.

the facts that Tennessee permits education of its students in both private schools and at home in addition to its public schools and that the state had approved several basic reading series for use in its public schools, the court concluded that there were acceptable alternatives for achieving the compelling state interest in educating its students which would be less restrictive than that proposed by the Hawkins County Public Schools.[73] Judge Hull's opinion refuted the assertion by the schools that the difficulty in administering alternative reading programs renders implementation of such programs impossible by referring to expert testimony that "the state's interest in uniformity is by no means absolute" because teaching is best accomplished through individualized education.[74] The fact that in the future the parents' and students' objections might extend to other portions of the curriculum of the Hawkins County Public Schools was found to be irrelevant because those objections and the instant case were limited to the reading program, with the line being drawn only at the Holt series as being intolerable to the plaintiffs' religious beliefs. The fact that nine students were accommodated in alternative reading programs for a significant part of the school year, without disruption of the educational process, belied defendants' argument based on such disruptions. The court found that granting plaintiffs' request for an alternative reading program would not bring a flood of requests for alternative programs from everyone with an objection to some aspect of the public school curriculum. The court denied that there would be such a flood but was careful to limit its holding to the facts of this case.[75]

In granting relief to plaintiffs, the court recognized that by accommodating their religious objections, the schools might be seen as violating the establishment clause by causing the state to become excessively entangled with religion through its schools.[76] The court stated: "It is hard to imagine any reading program for the plaintiffs offered at the schools which would not present Establishment Clause problems."[77] To avoid this problem, the court made use of the "opt-out" provision in the Tennessee statutes,[78] whereby students and parents may choose a home schooling option rather than attending the public schools. The court extrapolated from this statute and held that plaintiffs in this case may opt-out of the reading program in the Hawkins County Public Schools. If students elect not to participate in the reading program at the schools, home schooling in reading would provide a satisfactory alternative without an excessive entanglement of the state in religion through its schools. The court required that the reading proficiency of students opting out be rated by standardized tests already in use by the

73. *Id.*
74. *Id.*
75. *Id.* at 1202.
76. Excessive entanglement of the government with religion is a part of the test, defined in Lemon v. Kurtzman, 403 U.S. 602 (1971), used to determine whether there has been a violation of the Establishment Clause.
77. *Remand Decision*, 647 F. Supp. at 1203.
78. TENN. CODE ANN. § 49-6-3050 (Supp. 1988).

state; any deficiencies would have to be corrected. The court left the details of such a program to the parents and professional educators.

Upon appeal of the remand decision, a three judge panel of the Sixth Circuit Court of Appeals unanimously reversed and remanded Judge Hull's decision with directions to dismiss the complaint.[79] Chief Judge Lively wrote the opinion for the court. This decision focused on the fact that the plaintiff students were not compelled to believe or to assert a belief in ideas contrary to their religion. Upon remand, the court relied on testimony and found that plaintiffs never asserted that the materials objected to actually offended plaintiffs' religious beliefs but only that they *could* be so interpreted.

> Both witnesses [Vicki Frost and Bob Mozert] testified under cross-examination that the plaintiff parents objected to passages that expose their children to other forms of religion and to the feelings, attitudes, and values of other students that contradict the plaintiffs' religious views without a statement that the other views are incorrect and that plaintiffs' views are the correct ones.[80]

The Sixth Circuit panel identified the threshold issue as being whether a government requirement that a person be exposed to ideas objectionable to his or her religious beliefs can be a burden on the constitutional right to free exercise. Chief Judge Lively referred to an affidavit filed by the Superintendent of the Hawkins County schools which distinguishes inculcation of values from mere exposure to them: "exposure to something does not constitute teaching, indoctrination, opposition or promotion of the things exposed."[81] Repeated exposure is no more inculcation than is a single such occurrence. Further, there was no proof that any plaintiff student was ever required to affirm a religious belief or to act in any way either required or forbidden by his or her religious beliefs. Citing plaintiffs' testimony, the court found that it was unlikely that a more balanced presentation would satisfy their objections since to them there is only one acceptable religious viewpoint: the "biblical" one that they hold. To accommodate plaintiffs' religious views the schools would necessarily violate the establishment clause under the holding of *Epperson v. Arkansas*[82] because such an accommodation would be to tailor a public school's curriculum to satisfy religious principles or prohibitions.[83]

> Balance in the treatment of religion lies in the eye of the beholder. Efforts to achieve the particular "balance" desired by any individual or group by the addition or deletion of religious material would lead to a forbidden entanglement of the public schools in religious matters, if done with the purpose or primary effect of advancing or inhibiting religion.[84]

79. *Circuit Six II*, 827 F.2d 1058, 1070 (6th Cir. 1987).
80. *Id.* at 1062.
81. *Id.* at 1063.
82. 393 U.S. 97 (1968).
83. *See infra* notes 207-09 and accompanying text.
84. *Circuit Six II*, 827 F.2d at 1065 (citations omitted).

Judge Lively found that the district court incorrectly applied the standards of *Sherbert* and *Thomas* to the instant case. Those cases were distinguished because there was government *compulsion* to engage in conduct which violated the plaintiffs' religious convictions. In the instant case, absent any showing that reading and discussing the Holt series involved affirmation or denial of religious beliefs or performance or non-performance of religious acts, there could be no violation of the right to free exercise. The Sixth Circuit held that in order for the free exercise clause to be violated there must be an element of government compulsion.[85]

Chief Judge Lively also distinguished the case of *Wisconsin v. Yoder*[86] from the instant case because the decision in that case was based on the unique circumstance that compulsory attendance at public school until the age of sixteen actually threatened the existence of the Old Order Amish way of life through exposure of Amish children to the outside world. In the instant case, plaintiffs insist that their children acquire all the skills necessary to live in the outside world but take exception to their exposure to certain ideas. In addition, there was no threat to plaintiffs' religious practices posed by exposure of their children to the ideas objectionable to those religious beliefs. The court found that the plaintiff parents could avoid such exposure by choosing the options provided by Tennessee law: private or home schooling.

The Sixth Circuit opinion cites *Bethel School District v. Fraser*[87] as standing for the proposition that the public schools serve the purpose of inculcating democratic values, including "tolerance of divergent political and religious" ideas while at the same time respecting others' beliefs.[88]

> The 'tolerance of divergent . . . religious views' referred to by the Supreme Court is a civil tolerance, not a religious one. It does not require a person to accept any other religion as the equal of the one to which that person adheres. It merely requires a recognition that in a pluralistic society we must 'live and let live.'[89]

The opinion also recognizes the ability of local school authorities to determine the curriculum for their school systems without interference by the courts so long as that curriculum does not violate the fundamental rights of students, teachers, or parents.[90]

Judge Lively summarizes the holding in the case:

> [T]he requirement that public school students study a basal reader series chosen by the school authorities does not create

85. The Sixth Circuit Court based its decision upon precedents such as Board of Education v. Barnette, 319 U.S. 624 (1943); Engel v. Vitale, 370 U.S. 421 (1961); and School District of Abington Township v. Schempp, 374 U.S. 203 (1963). For a discussion of these cases see *infra* notes 178-89, 196-206 and accompanying text.

86. 406 U.S. 205 (1972).

87. 478 U.S. 675 (1986).

88. *Id.* (citing *Circuit Six II*, 827 F.2d at 1068).

89. *Circuit Six II*, 827 F.2d at 1069.

90. *See infra* notes 193-200 and accompanying text.

> an unconstitutional burden under the [f]ree [e]xercise [c]lause when the students are not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion. There was no evidence that the conduct required of the students was forbidden by their religion. Rather, the witnesses testified that reading the Holt series "could" or "might" lead the students to come to conclusions that were contrary to teachings of their and their parents' religious beliefs. This is not sufficient to establish an unconstitutional burden.[91]

IMPLICANTIONS OF THE *MOZERT* CASE FOR PUBLIC EDUCATION

Overview of Fundamentalist Christian Objections to Public Education

The list of the plaintiffs' objections in the *Mozert* case is a statement of the general objections that Fundamentalist Christians have to American public education generally.[92] Additional goals not brought to light by the case include a return to the phonics method of teaching reading[93] and creation of a "voucher tuition-credit system" to be used by parents to send their children to the school of their choice, public or private, rather than be burdened with both taxes to support the public schools and tuition.[94] These goals are not addressed in this paper.

The conservative Christian position regarding education is most succinctly stated in the "STUDENT'S BILL OF RIGHTS."

> 1. THE RIGHT TO BE TAUGHT TO READ THE ENGLISH LANGUAGE IN THE FIRST GRADE. If I am unable to read materials available in my home by mid-year of the First Grade, I have been denied my right and should be transferred immediately to an intensive Phonics method of instruction.
> 2. THE RIGHT TO PRIVACY. Schoolpersons may not force me to discuss, or play Magic Circle, or answer questions, write assignments, or keep journals about my religion, moral values, family, attitudes and feelings, sex behavior and private parts of the body, political attitudes, or what I and my family do at home.
> 3. THE RIGHT TO MY RELIGIOUS FAITH AND BELIEFS. Schoolpersons may not force me to do assignments or engage in classroom activities which criticize or downgrade my religion. Examples of such practices are: teaching that any religion or non-religion is as good as another, that there are many gods, or that God did not create the world; teaching witchcraft, the occult, or astrology; conducting Eastern mysticism, yoga, Transcendental Meditation (TM), Quieting Reflex (QR), guided fantasy or imagery, or "stress" courses using hypnotic practices.
> 4. THE RIGHT TO SHARE INFORMATION WITH MY PARENTS by taking home any textbooks, materials, lessons, and assignments,

91. *Circuit Six II*, 827 F.2d at 1070.
92. *See supra* notes 41-49 and accompanying text.
93. STUDENT'S BILL, *supra* note 1.
94. *See* Miller, *supra* note 3.

and by giving them access to computer software and sound and video tapes of classroom activities.

5. THE RIGHT TO HAVE AND TO HOLD MY MORAL VALUES AND STANDARDS, MY POLITICAL OPINIONS, AND MY CULTURAL ATTITUDES. Schoolpersons may not impose on me the value system that ethics are situational or that moral dilemmas have no right or wrong answers; may not ask me to make personal decisions whether to lie, to cheat, to steal, to take drugs, to drink alcohol, to engage in premarital sex with either gender, or to kill (as promoted in the "lifeboat game" or in discussions of abortion, euthanasia, and suicide); may not require me to role-play open-ended psychological problems; may not put me in a school environment of premarital promiscuity by the in-school dispensing of contraceptives and abortion services.

6. THE RIGHT TO ALTERNATE ASSIGNMENTS WHEN I OR MY PARENTS BELIEVE THAT SCHOOLPERSONS ARE VIOLATING MY RIGHTS OR IMPOSING UPON ME LESSONS, FILMS OR MATERIALS INAPPROPRIATE FOR MY GRADE LEVEL. Since thousands of good books and materials are easily available, when I or my parents object to a course, book, or assignment, schoolpersons have the duty to give me alternate schoolwork for full credit and without discrimination. Schoolpersons have the obligation to notify parents when classroom materials may be objectionable (such as the film "The Lottery").

7. THE RIGHT TO HAVE MY FAMILY TREATED WITH RESPECT. Schoolpersons may not, through lesson, film or innuendo, convey the notions that parents are old-fashioned, untrustworthy, uninterested in me, have obsolete values and attitudes, or might abuse me. When my parents exercise their rights to excuse me from a course, class, book or assignment, schoolpersons may not retaliate against them or me, embarrass me in front of my classmates, or take action against me which is perceived as punishment or humiliation.

8. THE RIGHT TO BE INSPIRED AND ENCOURAGED BY CLASSROOM LESSONS, NOT DEPRESSED OR DISTURBED. I have the right to be taught the greatness of America and our Constitution, and that ours is a land of freedom and opportunity for those who learn, work hard and persevere. Schoolpersons may not depress me with lessons, discussions or films about death, dying, violence, surgery, suicide, or dire predictions about the end of the world.

9. THE RIGHT TO THE SANCTITY OF MY BODY AND TO SAFETY ON THE SCHOOL PREMISES. Schoolpersons may not touch me in the private parts of my body, or talk to me about touching me in my private parts. Schoolpersons have the obligation to provide for my security against physical attack and abuse, vandalism or theft of my property, peddlers of illegal drugs, and the use of profanity, blasphemy or vulgarity by schoolpersons or students.

10. THE RIGHT TO FULL COMPLIANCE WITH FEDERAL AND STATE LAWS. Schoolpersons have the obligation to give full notification to parents and students about applicable laws and the procedures to implement them. Schoolpersons have the obligation to comply fully with all laws requiring parental con-

> sent for certain courses or materials, as well as all laws mandating such exercises as the daily recital of the Pledge of Allegiance to the American Flag or studies in the U.S. Constitution.[95]

This statement goes beyond the objections of the plaintiff parents in *Mozert* by including the requirement of full compliance with federal and state laws and the right to physical and emotional safety on school grounds. Certainly, no person could rationally take issue with the right of a student to be safe while at school, but many of the other so-called rights propounded by the Eagle Forum, which wrote the "Students Bill of Rights," are at least controversial and at worst egregious, especially in light of the traditional role of public education in the United States and Supreme Court rulings regarding religion in the public schools.[96]

The pamphlet containing this statement of students' rights also contains two other lists, setting out "THE STUDENT'S RESPONSIBILITIES" and "THE PILLARS OF SUPPORT FOR PUBLIC SCHOOLS." The list of student's responsibilities are statements that students will respect their fellow persons in the school community and act "properly" as students, generally promising to comport themselves consistently with the obligations imposed by their "BILL OF RIGHTS." The "PILLARS OF SUPPORT" language is more controversial:

> 1. In the public school classroom, the child is a captive audience and schoolpersons are authority figures. This authority is limited by the students' rights, their parents' rights, and the constant supervision of citizens and taxpayers.
> 2. All individuals who utilize taxpayers' money must accept citizen surveillance of their decisions and performance of duties. This applies to the President, Congress, federal, state and local officials, school board members, librarians, and all school personnel.
> 3. Under U.S. law and Supreme Court decisions, parents are the primary educators of their children. All school courses, materials and activities are subject to the primary control of parents acting in supervision of their own children and in the unhampered exercise of their constitutional rights.[97]

Propositions one and two are not particularly arguable in that they are statements of conventional wisdom. Could anyone seriously argue that school children are *not* a captive audience? However, the assertion in proposition three which states that "under United States law and Supreme Court decisions, parents are the primary educators of their children," may be drawing too fine a point from precedent.[98] Primary control of the curricula of the public schools properly lies in the hands

95. STUDENT'S BILL, *supra* note 1.

96. *See infra* notes 94-144 and accompanying text for a discussion of the role of values education in public education in the United States; *see infra* notes 158-223 and accompanying text for a discussion of Supreme Court precedent regarding religion and parents' rights to determine curriculum content in the public schools.

97. STUDENT'S BILL, *supra* note 1.

98. *See infra* notes 158-223 and accompanying text for a full discussion of federal judicial precedent regarding the rights of parents to control public school curricula.

of professional educators who are *guided* by community standards as well as federal, state and local law.

The remainder of this Note will consider both traditional and current viewpoints as to the nature and goals of public education and whether there can be a reasonable accommodation of the Fundamentalist Christians' demands that would leave the public education system of the United States able to carry out its mandate and abide by Supreme Court precedent with regard to the religion clauses.

THE ROLE OF THE PUBLIC SCHOOLS AND VALUES EDUCATION IN THE UNITED STATES

The Beginnings

Since before the American Revolution, the education of their children has been of great concern to the people of this nation. The earliest efforts to provide education were primarily motivated by religion, with the first schools being associated with churches, providing for the education of ministers and ensuring the ability of churchmembers to read the Bible.[99] Zeal for education, however, was not limited to the colonists or to religious groups. Education was a high priority throughout the frontier period of American history and every section of the growing country sought to provide for the education of its children, as demonstrated by the Ordinance of 1785.[100]

The curricula of the early public school systems were greatly influenced by Protestant Christianity, as reflected in the textbooks used at that time.[101] Sectarianism was avoided, not religion, and the schools

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99. *See generally* WRIGHT, *supra* note 15; NEUFELDT, *Religion, Morality and Schooling* [hereinafter NEUFELDT], in RELIGION AND MORALITY IN AMERICAN SCHOOLING (T. Hunt & M. Maxson ed. 1981) [hereinafter Hunt & Maxson]; D. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 8, 138 (1958); Edwards, *Civil Religion and the American Public Schools* [hereinafter Edwards], in Hunt & Maxson, *supra*, at 179; Moskowitz, *The Making of the Moral Child*, 6 PEPPERDINE L. REV. 105, 107-114 (1978) [hereinafter Moskowitz]. *See also* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) (Frankfurter, J., concurring); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 230 n.7 (1963) (Brennan, J., concurring); Lemon v. Kurtzman, 403 U.S. 602, 650 (1971) (Brennan, J., concurring).

100. *See* Elson, GUARDIANS OF TRADITION 3 (1964) [hereinafter GUARDIANS]; WRIGHT, *supra* note 15 (with specific attention on chapters one through four).

An example of the national concept of the importance of education is the Ordinance of 1785 which

> prescribed that each township should be laid out with thirty-six numbered sections of 640 acres each, and that Section 16 [in each township] should be reserved for public education. The Ordinance of 1787 [reauthorizing the earlier Ordinance] had declared that 'religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'

WRIGHT, *supra* note 15 (quoting the Ordinance of 1787).

101. *See generally*, WRIGHT, *supra* note 15; GUARDIANS, *supra* note 100; Moskowitz, *supra* note 99; Perko, *Schooling and the American Civil Religion*, in UME PUBLIC EDUCATION POLICY STUDIES (1986) [hereinafter Perko]; H. PERKINSON, TWO HUNDRED YEARS OF AMERICAN EDUCATIONAL THOUGHT (1979) [hereinafter PERKINSON]. Perkinson's book is a compendium of quotations of educational philosophy from some famous and not so famous Americans interspersed with Perkinson's interpretations and comments. American educational thinkers from Franklin and Jefferson to Mann and Dewey invoke various "universal" tenets

promoted Protestant unity.[102] Throughout the nineteenth century, religious aspects of public school education were de-emphasized, at least partly to defuse conflicts between Catholic and Jewish immigrants and the predominant Protestant populace over the way religion would be presented in the schools.[103] The removal of "Judeo-Christian" religious influence has continued to the present day, and it is now widely recognized that textbooks and teachers nationwide actually avoid discussion of Judeo-Christian religion in order to avoid controversy in the classroom and conflict with parents.[104] National enthusiasm for public education, however, continues to the present time, as demonstrated by the attention given educational issues in the news media.

The goals of American public education have been viewed consistently from before its widespread establishment[105] and some have asserted that the general goals of education have been constant throughout the history of western civilization.[106] Prominent early American political leaders, such as Benjamin Franklin and Thomas Jefferson,[107] believed that the purpose of education was to create good citizens capable of contributing to their country's growth and prosperity. In this view, a "good citizen" is able to analyze conflicting viewpoints and to reach reasoned decisions regarding alternative solutions to public problems, whether propounded by politicians or other "experts."[108] Those who have learned the expectations society has of them and who are able to fulfill those expectations are good citizens.[109] The importance of instilling the qualities of good citizenship and loyalty to the national state grew in the late nineteenth and early twentieth centuries as a result of the growth of the frontier, rapid increase in immigra-

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of Protestant ideology in their discussions of the role that education in general and public schooling in particular should play in peoples' lives.

102. NEUFELDT, *supra* note 99, at 10, 15.

103. Perko, *supra* note 101; NEUFELDT, *supra* note 99, at 17-23; D. RAVITCH, THE GREAT SCHOOL WARS (1979) [hereinafter SCHOOL WARS]. Ms. Ravitch studied the history of public education in New York City and believes that the history of those schools is a paradigm for that of the nation's schools in general. *See also*, Illinois *ex rel.* McCollum v. Board of Educ. 333 U.S. 203, 212 (1948) (Frankfurter, J., concurring).

104. Miller, *supra* note 3. *See also* ASCD REPORT, *supra* note 3; PAW STUDY, *supra* note 4; NIE Study, *supra* note 3; AU STUDY, *supra* note 43; Moskowitz, *supra* note 99, at 110; Brief for Appellee Parents, *supra* note 27, at 16-21.

105. *See* M. KATZ, THE IRONY OF EARLY SCHOOL REFORM (1968) [hereinafter KATZ A]; M. KATZ, SCHOOL REFORM (1971) [hereinafter KATZ B]; PERKINSON, *supra* note 101; Perko, *supra*, note 101.

106. P. NASH, A. KAZAMIAS & H. PERKINSON, THE EDUCATED MAN (1982) [hereinafter EDUCATED].

107. PERKINSON, *supra* note 101; T. JEFFERSON, A BILL FOR THE MORE GENERAL DIFFUSION OF KNOWLEDGE (1779), *reprinted in* T. JEFFERSON, WRITINGS 365-373 (M. Peterson ed. 1984) [hereinafter WRITINGS]; T. JEFFERSON, AUTOBIOGRAPHY (1892), *reprinted in* WRITINGS, *supra* at 42-43; T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1787), *reprinted in* WRITINGS, *supra* at 271-274; Letter from Thomas Jefferson to George Wythe (Aug. 13, 1786), *reprinted in* WRITINGS, *supra* at 857-860.

108. *See* WRITINGS, *supra* note 107, at 42-43, 271-74, 365-73, 857-60. All of Jefferson's references to education suggest its importance to him due to his belief that only educated citizens could help preserve the new American republic. *See also* PERKINSON, *supra* note 101, at 158-59.

109. PERKINSON, *supra* note 101, at chapters 3 & 6. *See infra* notes 94-126 and accompanying text for a discussion of the nature of these expectations.

tion and industrialization, and "urbanization," all of which generated concern over the dilution or distortion of "American" culture and values.[110]

Another consistent goal of American public education has been development of each individual to the limit of his or her capability. Some proponents of this viewpoint believe that individual growth is more important than inculcation of the values system maintained by society as a whole (creation of "good citizens").[111] Although some consider these two goals to be in conflict,[112] others assert that they are compatible.[113] A passage from a letter written by Thomas Jefferson to his favorite law professor, George Wythe, states Jefferson's view of the parallel importance of these two aspects of education: "I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom and happiness."[114] Jefferson believed that the only hope for this nation was an independant, educated populace which could make reasoned choices between political candidates and informed decisions in resolving governmental issues, as well as contributing to the growth of prosperity. The role of public education to Jefferson was to promote the intellectual development of all citizens to the best of their abilities so that they could better fulfill their duties as citizens.[115] Jefferson did not believe that the Bible should be taught at the elementary or grammar school level.[116]

The American Civil Religion and Values Education

> [T]here is a "religion," or set of values and normative behaviors, held in common by the majority of Americans that gives a sense of unity and purpose and provides meaning for lives. This civil religion need not conflict, though it sometimes does, with whatever church affiliations people hold. Often, in fact, it is already supported by denominational institutions, particularly by those of conservative Christian traditions.[117]

An interesting and thoughtful view of the function of public schools in the United States has been presented in connection with the concept of

110. Moskowitz, *supra* note 99, at 109-110; Perko, *supra* note 101, at 13; NEUFELDT, *supra* note 99, at 23-24; Vallance, *Hiding the Hidden Curriculum* [hereinafter Vallance], in HIDDEN CURRICULUM, *supra*, note 11, at 18-19.

111. *See generally* PERKINSON, *supra* note 101, at chapter 9; HIDDEN CURRICULUM, *supra* note 11.

112. PERKINSON, *supra* note 101, at chapter 9; HIDDEN CURRICULUM, *supra* note 11; KATZ B, *supra* note 105, at 88.

113. PERKINSON, *supra* note 101, at chapter 9 (with specific attention to 310); Miller, *supra* note 3. The belief that these two goals are compatible is apparent within the language of the Ordinance of 1787.

114. WRITINGS, *supra* note 107, at 859.

115. *See infra* note 140 (for citations referring to Jefferson's philosophy of education).

116. WRITINGS, *supra* note 97, at 273. Jefferson likely would be maligned today by Fundamentalist Christians for being a secular humanist because of his rather independent views on the relative roles of faith and reason, God and man.

117. Edwards, *supra* note 99, at 180.

the "American Civil Religion."[118]

The central belief of this "religion" is that Americans are chosen by God to establish a new social order on earth. The God of this religion is closely related to order, law, and "right."[119] There is a common set of "saints," including Washington, Jefferson, and Lincoln, who embody honor and good in political leadership. Holidays, such as the Fourth of July and Memorial Day, and national shrines, such as Arlington Cemetery and Gettysburg are also symbols of this religion. The "holy scriptures" of this religion are the Declaration of Independence, the Constitution and the Bill of Rights. The public schools serve to transmit the values of the civil religion and also serve as one of its strongest symbols, its "church."[120] The American Civil Religion unites Americans of all religions in a "common societal faith."[121]

Although the American Civil Religion has not been entirely static, going through periodic revisions in response to changing political and cultural pressures, the values it espouses have been fairly constant.[122] A study of the curricula mandated by statute in each of the fifty states found that inculcation of certain virtues, along with teaching of "basic studies," is required by every state.[123] These virtues include tolerance, patriotism, morality, truthfulness, honesty, generosity, and subordination to authority. These are the same virtues espoused by the American Civil Religion.[124] Citing the striking similarities in public schools throughout the country, despite the fact that each school system is locally controlled, one author identifies the motivation behind universal public education as a major factor in creating this uniformity.

> Anxious over the fate of a fledgling republic, and concerned about the diversity among the immigrants who, by the 1850's, were entering the country at the rate of 200,000 a year, educators such as [Horace] Mann created an institution calculated to effectively socialize children into the civil religion of the republic. . . . All needed to develop a sense of themselves as Americans, and to cultivate those virtues thought necessary for

118. *See generally* AMERICAN CIVIL RELIGION (Richey & Jones. ed. 1974); BELLAH, CIVIL RELIGION IN AMERICA (1968) [hereinafter BELLAH]; YULISH, THE SEARCH FOR A CIVIC RELIGION (1980). Civil religion has been a difficult concept to define because it is an abstraction of a "transcendental faith," but a reasonable definition has been proposed:

> [C]ivil religion is a set of beliefs and attitudes that explains the meaning and purpose of any given political society in terms of its relationship to a transcendent, spiritual reality, that are held by the people generally of that society, and that are expressed in public rituals, myths, and symbols.

Edwards, *supra* note 99, at 182.

119. BELLAH, *supra* note 118, at 9.

120. *See generally* Edwards, *supra* note 99; Perko, *supra* note 101.

121. Edwards, *supra* note 99, at 181.

122. *See, e.g.*, Perko, *supra* note 101; Edwards, *supra* note 99, at 187.

123. Edelman, *Basic American*, 6 NOLPE SCHOOL L.J. 6, 97-98 (1978) (cited in Perko, *supra* note 101, at 9). For example, the state of Colorado requires that the public schools teach history, culture and civil government, including the contributions of minorities, provide information as to the honor and use of the flag, instruction in the United States Constitution and the value of temperance. COLO. REV. STAT. § 22-1-101 to 119 (1973 & 1984).

124. Perko, *supra* note 101, at 9; Edwards, *supra* note 99, at 186-89. *See generally* Vallance, *supra* note 110.

> democratic life and economic success. . . . The study of American history, inculcation of virtues such as honesty and industry, and concern with developing respect [tolerance] for individual and group differences were all perceived as vital to the survival and prospering of American life.[125]

Thus, the public school systems throughout the United States serve to instill the democratic values commonly held by the vast majority of the population, those of the American Civil Religion.[126]

THE AMERICAN CIVIL RELIGION AND FUNDAMENTALIST CHRISTIANS

Struggles over curricula of the public schools and the precepts of the American Civil Religion have occurred from time to time in the history of American public education. These struggles generally have reflected the efforts of groups with new-found political strength challenging the precepts of the American Civil Religion and demanding that their views be incorporated within it.[127] The American Civil Religion has accommodated such changes in the past and is likely to do so in the future. The current "battle for the public schools" is simply the most recent manifestation of this sort of struggle, pitting Fundamentalist Christian ideologies against the more widely held "nonsectarian" tenets of the American Civil Religion.

Civil religion is not all good. Dangers inherent in it include a nationalism in which the state itself becomes the center of worship rather than serving to bind together its citizens by means of common historic events and traditions.[128] Fusion of God and nation can become a rationale for attacking nonconformist or non-conservative ideas or groups and for strengthening the position of conservative, jingoistic groups.[129] Anyone disagreeing with the chauvinistic beliefs of such groups is branded as irreligious, immoral and unfit to hold political office.[130]

Another danger in the American Civil Religion is that it exemplifies "male WASP culture,"[131] ignoring the contributions of women as well as those of other ethnic and racial groups to our national development. The danger in this is that "[w]hen one believes that God has chosen the white man in America to rule the world, it follows that the destruction of others is simply doing the will of Divine Providence. According to this view, any means is morally right if the world is thus 'made safe for democracy.' "[132] It is arguable that United States involvement in Viet Nam and the political repression of opposition to the war was at least in part a negative manifestation of the American Civil Religion.

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125. Perko, *supra* note 101, at 13.
126. Vallance, *supra* note 110, at 9-10.
127. *See generally* SCHOOL WARS, *supra* note 103; KATZ A, *supra* note 905; KATZ B, *supra* note 105; Perko, *supra* note 101; Edwards, *supra* note 99.
128. Edwards, *supra* note 99, at 185.
129. *E.g.*, BELLAH, *supra* note 118; Edwards, *supra* note 99; Perko, *supra* note 101.
130. Edwards, *supra* note 99, at 185.
131. *Id.*
132. *Id.* at 186.

Many of the Fundamentalist Christians' objectives for reforming public education in the United States may be viewed as exarcerbating the least desirable aspects of the American Civil Religion. Anyone disagreeing with the views of Fundamentalist Christians are branded as immoral and irreligious. Fundamentalist Christians demand that America be portrayed in the schools only as a just and righteous God-fearing nation that can do no wrong. America, as God's chosen nation, should rule the world. The public schools, in which Fundamentalist Christian children are exposed to ideas contrary to those of their parents, are characterized as the center of a conspiracy to destroy the United States by sapping its morality and its will to resist the communist threat. Once the schools sap the technological and moral strength of the United States, it is predicted that it will combine with the Soviet Union in an overarching one-world government that recognizes no God.[133] Thus viewed as an enemy of Fundamentalist Christian ideologies, the public schools must either be radically changed so as to present the "proper Christian perspective" or be destroyed.[134] Some educators and religious leaders believe that destruction of public education is the absolute goal of the Fundamentalist Christians involved in attacks on the public school systems of this nation.[135]

Despite the extreme position they take, Fundamentalist Christians have identified at least one genuine problem with the system of public education and the way that it reflects the American Civil Religion. Studies of textbooks used in public schools throughout the United States have shown that religion and the influences it has had on the development of our nation have been ignored.[136] It is not possible to accurately recount the history of the development of this nation without including a discussion of the influence of Judeo-Christian religion. From the migration of the Pilgrims to the Abolition movement, from the labor struggles of the Industrial Revolution to the Civil Rights movement of the 1960's and the present-day Sanctuary movement, religion has played a vital role in the development and growth of the spirit of this country. Such contributions must be recognized by American public education if it is to accurately reflect and transmit the social values and history of this nation.

As the parents in *Mozert* argue, omission of any reference to a particular religion could be viewed as bias against that religion.[137] The Fundamentalist Christians are a group with recently recognized political

133. *See generally* LaHaye, *supra* note 1; CUNNINGHAM, *supra* note 13.

134. *See* WOOD, *Secular Humanism and the Public Schools*, in UME PUBLIC EDUCATION STUDIES (1986) [hereinafter WOOD]. Wood quotes Jerry Falwell as stating:

> One day, I hope in the next ten years, I trust that we will have more Christian day schools than there are public schools. I hope I live to see the day when as in the early days of our country, we won't have any public schools. The churches will have taken them over again and Christians will be running them.

Id. at 8.

135. Interview with a Colorado educator who asked not to be identified (Apr. 11, 1987).

136. NIE Study, *supra* note 3; PAW STUDY, *supra* note 4; AU STUDY, *supra* note 43.

137. Brief for of Appellee Parents, *supra* note 27, at 26-33.

strength[138] and are asserting their perceived right to have their views incorporated into the American Civil Religion. This situation is similar to those battles already fought to force the American Civil Religion to accommodate "new" or different viewpoints so as to more accurately reflect the overall ideals of American society and should be resolved in the same way.[139] However, it would be wrong to adopt all of the changes in public education demanded by the Fundamentalist Christians, especially with regard to their objections to the methods of teaching used today in most school districts. It is clear that the mandate of the public schools of the United States is to create good citizens who are able to make rational political choices and to foster the greatest individual growth possible.[140] It is also clear that implementing all of the changes in public school curricula demanded by Fundamentalist Christians would inhibit the public schools' ability to achieve that mandate.

Present Professional Concepts of Values Education

Present-day educators believe that the schools have a two-fold responsibility in teaching values and morals.[141] First, consistent with the basic purpose of education, the schools are required to transmit the cultural norms of the society in which they function. This involves teaching the predominant values-orientation of that society as well as its more generalized cultural characteristics and attitudes.[142] Secondly, schools should serve to foster the growth of individual students so that every student reaches maximum potential as a person.[143] However, debate rages over how best to accomplish these dual goals; and, there is debate over their relative importance. For example, should society's values and moral framework be inculcated in students, that is, imprinted on them by means of a doctrinal approach that brooks no exception? Or should the schools teach students the general outlines of societal standards, exposing them to as many differing viewpoints as possible and then equip each student with the skills necessary to make his or her own choice as to which values-system is preferred?

The generally accepted view among educators is that mere inculca-

138. The "Moral Majority" was first recognized by most people as a politically powerful group during the campaign for the 1980 presidential election.

139. *See infra* notes 153-57 and accompanying text.

140. *See supra* notes 94-126 and accompanying text.

141. *See generally* HIDDEN CURRICULUM, *supra* note 11; Hunt & Maxson, *supra* note 99; DEVELOPMENT OF MORAL REASONING (Cochrane Manley-Casimir ed. 1980) [hereinafter DEVELOPMENT OF MORAL REASONING]; Moskowitz, *supra* note 99; GALABRAITH & JONES, MORAL REASONING (1976) [hereinafter MORAL REASONING]; NATIONAL EDUCATION ASSOCIATION, VALUES CONCEPTS AND TECHNIQUES (1976) [hereinafter NEA VALUES]; KAY, MORAL EDUCATION (1975) [hereinafter KAY]; MORAL EDUCATION (Crittendon & Sullivan ed. 1971).

142. *See supra* notes 94-126 and accompanying text. Both Edwards and Perko argue that the ACR comprises this aspect of education in the United States. *See also* Maxson, *The Impact of Schooling on Children's Acquisition of Values* [hereinafter Maxson], in Hunt & Maxson, *supra* note 99, at 201.

143. *See generally* PERKINSON, *supra* note 101; HIDDEN CURRICULUM, *supra* note 11. Although some perceive the emphasis on individual growth as a recent development, beginning in the twentieth century, it is clear that Jefferson favored public education because it would help students achieve the most that they could in life.

tion of values and morals on students is not effective.[144] A person can "know" what decision is morally correct and not act consistently with that knowledge. In order to effectively learn values systems or morality, students need to be able not only to recognize the "correct" choice in circumstances "testing" their morality, but also to act on that choice.[145] Educators, educational sociologists, psychologists, and philosophers differ as to the best approaches to be used in developing the ability to act morally. However, most of these professionals agree that acting morally is a rational process involving consideration of alternative actions and choosing that action which fits each individual's perceptions as to what is moral.[146] Exposure to alternative solutions to moral dilemmas and the ability to project oneself into the situation of another are widely agreed to be important in fostering moral development.[147] The ability to reason analytically and to think critically are essential in fostering the moral development of children. Moral development involves incorporating a values system into one's life. Most people in the United States adhere to a common values system which has been identified by some as the American Civil Religion.[148]

Current psychological research suggests that children learn best through experience, whether genuine or vicarious, and that imagery, role-taking and role-playing are techniques important in developing thinking skills as well as socially acceptable values. These techniques give children the opportunity to "practice" making choices about appropriate behavior in morally ambiguous situations. By practicing in these ways, children can develop their own sense of what is morally correct by applying the values they have learned at home, in church and at school, in ways that are not threatening to their health or safety. Avoiding threats to health and safety is one of the goals of the Student's Bill of Rights.[149] Although Fundamentalist Christians are opposed to role-playing, guided imagery (use of the imagination), critical thinking and reading, and discussion of current social issues involving families, these techniques have found wide acceptance as effective tools in developing values and should not be discarded. Local school boards, on the advice of professional educators, have adopted these techniques throughout

144. *See* Kohlberg, *The Moral Atmosphere of the School* [hereinafter Kohlberg B.], in HIDDEN CURRICULUM, *supra* note 11, at 61; Kohlberg, *The Cognitive-Developmental Approach to Moral Education* [hereinafter Kohlberg A], in NEA VALUES, *supra* note 141, at 18; Cochrane, *Moral Education and the Curriculum*, in DEVELOPMENT OF MORAL REASONING, *supra* note 141, at 60; KAY, *supra* note 141; Maxson, *supra* note 142.

145. *See* Friere, *The Banking Concept of Education*, in HIDDEN CURRICULUM, *supra* note 11, at 283; Fenstermacher, *Manner as Medium for Morals* [hereinafter Fenstermacher], in Hunt & Maxson, *supra* note 99, at 123; Maxson, *supra* note 142; Raths, *Freedom, Intelligence, and Valuing* [hereinafter Raths], in NEA VALUES, *supra* note 141, at 9; Simon, *Values Clarification vs. Indoctrination* [hereinafter Simon], in NEA VALUES, *supra* note 141, at 135.

146. *See* Kohlberg A, *supra* note 144; Kohlberg B, *supra* note 144; Fenstermacher, *supra* note 145; Raths, *supra* note 145.

147. *See* Kohlberg A, *supra* note 144; Kohlberg B, *supra* note 144; KAY, *supra* note 141; MORAL REASONING, *supra* note 141; Moskowitz, *supra* note 99; NEA VALUES, *supra* note 141, at 75 (emphasis on Part Two which is titled "Techniques").

148. *See supra* notes 94-126 and accompanying text.

149. *See supra* notes 94-96 and accompanying text.

the country. Unless it can be demonstrated that these teaching techniques violate the fundamental rights of students, teachers or parents, courts are powerless to interfere.

Present Professional Concepts of Teaching Thinking Skills

Many educators believe that the change from the "Industrial Era" to the "Information Age" requires a change in educational goals and practices. Because of the information explosion, it is now impossible for teachers, charged with the responsibility of teaching "content" curriculum, to cover all of the material involved in their specialties. Thus, there is a need to develop skills in problem solving, reasoning, conceptualization and analysis.[150] In other words, the changing nature of our society requires schools to teach thinking skills as well as facts and, perhaps, to change the emphasis of education away from feeding facts into children's brains to stressing development of thinking skills. Recent developments in educational psychology and neurobiology have improved our understanding of the development of thinking skills.[151] The latest research in these areas suggests that educators should include in every curriculum those mental tactics holding the most promise for multiplying the natural powers of the mind.[152] Typically, the approaches recommended for accomplishing development of thinking skills differ in many respects, but there is general consensus as to the importance of some techniques.[153] Those techniques emphasize classroom discussion, role-taking and role-playing. In other words, involving children in the exercise of thinking, and exposing them to approaches to thinking taken by others, helps them to develop their own abilities. This is accomplished by allowing each student to evaluate not only the approaches to thinking he or she uses, but those of other students as well.[154] Use of current social problems, personal experiences, and literature serve to expose children to interesting situations in which they develop the ability to think, whether the thought process is intended to reach some moral/value decision or to solve a problem in logic or mathematics.[155] If these techniques were not utilized in our public schools, many professionals believe, the quality of education received by American children would decline and students would not adequately be prepared for their

150. McTighe & Schollenberger, *Why Teach Thinking* [hereinafter McTighe], in ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT, DEVELOPING MINDS 3 (Costa ed. 1985) [hereinafter DEVELOPING MINDS]. History, science, and social studies are part of the "content" curriculum.

151. *See generally* DEVELOPING MINDS, *supra* note 150; *Frameworks for Teaching Thinking*, 43 EDUCATIONAL LEADERSHIP 3 (1986) [hereinafter *Framework for Thinking*].

152. Perkins, *Thinking Frames*, 43 EDUCATIONAL LEADERSHIP 4, 5 (1986) [hereinafter Perkins].

153. DEVELOPING MINDS, *supra* note 150, at parts VII, VIII; *Framework for Thinking*, *supra* note 151.

154. DEVELOPING MINDS, *supra* note 150, at part VI.

155. *See id.*; Brandt, *Overview*, 43 EDUCATIONAL LEADERSHIP 3 (1986); Perkins, *supra* note 153; Marzano & Arredondo, *Restructuring Schools Through the Teaching of Thinking Skills*, 43 EDUCATIONAL LEADERSHIP 20 (1986); Brief for Appellant Schools, *supra* note 18, at 1-8.

lives as citizens.[156] Schools producing citizens who are unable to think critically and analyze ramifications of possible choices would be failing in their primary function. Schools which did not teach their students to think critically would not be developing each student to their maximum potential and would fall short of the second major goal of public education in the United States.[157]

The statements of professional educators, educational philosophers, sociologists, and psychologists regarding the importance of values/moral education and teaching of thinking skills directly contradict Fundamentalist Christians' preferred approaches to these subjects. This conflict created the most basic issue presented in *Mozert*: Who will control the curriculum of our public schools? In order to suggest an answer to that question, it is necessary to consider Supreme Court decisions in the area of the religion clauses as they relate to the public schools and their curricula.

Teaching About Religion in the Public Schools

Although approaches to teaching religion in the public schools vary somewhat from community to community, there is a consistent policy prohibiting the advancement of or opposition to religion or non-religion.[158] The Supreme Court has indicated that teaching *about* religion is permissible. The Educational Policies Service of the National School Boards Association provides copies of policy guidelines proposed or adopted by local school boards.[159] Several of these policy guidelines serve as the basis of discussion in this section of the note.

A policy guideline adopted by the Boulder Valley Public Schools in Boulder, Colorado in 1977 requires teachers to meet with their building principals at the beginning of the school year if they plan to present school programs which involve religious content. The aim is to insure that such programs actually serve an educational or cultural purpose and are not intended to promote religion. There is an "appeal" process whereby teachers and principals who cannot reach agreement regarding appropriate content for such programs meet with a review committee to be sure that both teacher and principal are complying with the guidelines. There has been a relatively high amount of strife in the Boulder public schools with regard to "religious education," arising mostly from Fundamentalist Christian parents and students.[160]

The policy guidelines from the other school systems are more gen-

156. McTighe, *supra* note 150; Hughes, *Introduction* to DEVELOPING MINDS, *supra* note 150, at 1.

157. *See supra* notes 94-126 and accompanying text.

158. Interview with Lauren Kingsbery, Legal Counsel for the Colorado Association of School Boards (Mar., 1987). Ms. Kingsbery provided copies of policy statements from the States of Colorado and Washington, and the local school boards of Boulder, Colorado, Mountain View, California and Cedar Rapids, Iowa. *See also* ANTI-DEFAMATION LEAGUE, THE PUBLIC SCHOOLS AND GUIDELINES ON RELIGION (n.d.).

159. *See, e.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

160. Miller, *supra* note 3.

eral than those used in Boulder. These policies state that public schools should remain neutral about religion. The guidelines for Colorado and for the Cedar Rapids public schools incorporate the three-prong test for determining a violation of the establishment clause set forth in *Lemon v. Kurtzman*.[161] In order to pass constitutional muster, school instruction must have a secular purpose, a secular primary effect, and require no excessive entanglement with religion.[162] All these policy guidelines emphasize the importance of religion in our national heritage and in our daily lives but carefully limit teaching to the *effects* and not the dogma of religion. The guidelines prohibit religious exercises, celebrations, and ceremonies. Each stresses the need to avoid either promoting any sectarian or non-religious viewpoint or making children feel uncomfortable about their personal religious faith. Religious music, symbols and displays used in the schools must have an objective, educational purpose. All these policy guidelines are intended to teach the importance of religious tolerance and the acceptance of differences between members of our pluralistic society.

Despite such carefully defined neutral guidelines having been established by the public schools, many teachers are afraid to teach anything which might be perceived as religious or non-religious because of the uproar they anticipate from Fundamentalist Christian parents and pupils.[163] There is a definite chilling effect from the attacks by Fundamentalist Christians on the public schools. According to one educator, this chilling effect is not limited to religion alone but spills over into any area that involves personal feelings, family life, sex education or values clarification.[164]

In *Board of Education v. Pico*,[165] Justice Blackmun emphasized the importance of first amendment liberties and stated that "[t]he classroom is peculiarly the 'marketplace of ideas'; the first amendment therefore 'does not tolerate laws that cast a pall of orthodoxy over the classroom.' "[166] This country is a "marketplace of ideas" and laws that cast a "chilling effect" leading to prior restraint on the free flow of ideas are not favored.[167] Fundamentalist Christians have been able to intimidate public school teachers into avoiding concepts which might arouse the Fundamentalist's ire. This is a form of prior restraint which generates a chilling effect and prevents teachers in the public schools from accomplishing their mandate: developing citizens to their fullest potential.

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161. 403 U.S. 602 (1971).

162. *Id.* at 612.

163. Miller, *supra* note 3; Mertz, *supra* note 3.

164. Interview with a Colorado educator who asked not to be identified (Apr. 11, 1987).

165. 457 U.S. 853, 877 (1982) (Blackman, J., concurring).

166. *Id.* (citing Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

167. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (which states that any system of prior restraint comes to this court with a heavy presumption against its constitutional validity); Near v. Minnesota, 283 U.S. 697 (1931) (which holds that it is the chief purpose of the speech guaranty to prevent previous restraints against publication).

THE SUPREME COURT, THE SCHOOLS AND THE RELIGION CLAUSES

The Supreme Court has often considered the societal role of education generally and of public education specifically.[168] The Court holds the same views of the role of public education as do professional educators, sociologists, and politicians.[169]

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[170]

This dictum, quoted from *Brown v. Board of Education*,[171] provides a starting point for a discussion of the Supreme Court's view of the role of public education in our society. This statement is also relevant to the issues raised by *Mozert*. The parallel arises because the basic conflict in *Brown* concerned acknowledgement and acceptance of our ratially pluralistic, democratic society. *Mozert* involved another aspect of the same conflict—given the pluralistic *religious* society of the United States today, can any single religious group, any more than any single racial group, control the curriculum of the public schools?

In *Meyer v. Nebraska*,[172] the Nebraska Legislature passed a statute prohibiting the teaching of foreign languages to students who had not passed the eighth grade. The avowed purpose of the law was "to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals . . . ."[173] The Court acknowledged that states could go "very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally . . . *but the individual has certain fundamental rights which must be respected.*"[174] The Court did not question the right of a state to "prescribe a curriculum for the institutions which

168. *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Board of Educ. v. Rowley, 458 U.S. 176 (1982); Ambach v. Norwich, 441 U.S. 68 (1979); Meek v. Pittenger, 421 U.S. 349 (1975); Wisconsin v. Yoder, 406 U.S. 205 (1972); School Dist. of Abington Township v. Schempp, 374 U.S. 202 (1963); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

169. *See supra* notes 94-126 and accompanying text.

170. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

171. 374 U.S. 483 (1954).

172. 262 U.S. 390 (1923).

173. *Id.* at 401.

174. *Id.* at 402 (emphasis added).

it supports"[175] but it did strike down the statute because it was applied arbitrarily to prevent language teachers from practicing their profession in violation of the fourteenth amendment. This case is an early recognition by the Court of a state or local government's discretion in controlling the curriculum it has prescribed for its schools and the limit imposed by the Constitution on that discretion.

Pierce v. Society of Sisters[176] resolved a conflict over the right of parents to send their children to private schools in the face of an Oregon statute requiring attendance at public school from the ages of eight to sixteen years or until completion of the eighth grade. Once again the Court used the fourteenth amendment to resolve the issue and found that the statute would interfere with school corporations' business and property. In striking down the statute, the Court stated:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for *additional* obligations.[177]

Although the Fundamentalist Christian plaintiffs in *Mozert* cite *Pierce* as supportive of parents' duty and right to prevent standardization of their children by public schools,[178] their reliance is misplaced. The holding in *Pierce* goes only to the fact that states cannot prohibit establishment and maintenance of private schools within their borders. In reaching its decision, the Court considered the fact that existing private schools in Oregon would be denied equal protection of their right to property if the statutory ban on private schools was allowed to stand. The Court acknowledged the pluralistic character of American society by allowing parents to exercise the option to send their children to private schools if they prefer such schools. The Court's statement that parents have the "right and . . . high duty . . . to prepare . . . [their children] for *additional obligations*" refers to training *beyond* that available in public schools, such as religious indoctrination, which should take place at home and in church.

In *West Virginia State Board of Education v. Barnette*,[179] Jehovah's Witnesses children refused for religious reasons to obey a board of education resolution requiring all students to salute the flag. As a result, the children were expelled from school and their parents threatened with punishment. In its decision, applying the free exercise clause to the schools, the Court focused on the fact that the defendants' refusal to comply with the resolution did not interfere with the rights of any other

175. *Id.* at 402. The idea that the states have discretion to determine the curriculum used in the schools it supports runs through the court's decisions relating to schools.
176. 268 U.S. 510 (1925).
177. *Id.* at 535 (emphasis added).
178. Brief for Appellee Parents, *supra* note 27, at 64-68.
179. 319 U.S. 624 (1943).

individuals to salute the flag and that the only conflict was between authority and rights of the individual. Acknowledging *Minersville School District v. Gobitis*,[180] which had upheld the same resolution just three years earlier, the Court recognized that "the State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of our country.' "[181] "Here, however, [unlike the facts in *Gobitis*], we are dealing with a *compulsion* of students to declare a belief."[182] The Court found that the *Barnette* case turned on the ability of the State to compel *anyone* to profess *any kind* of belief. The Court asserted that government of limited power need not be a weak government and that to protect individuals' rights under such a government "is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end."[183] The Court utilized the fourteenth amendment to apply the first amendment to the states so as to protect citizens against state power to compel belief. The Court found that boards of education have important functions, and that:

> Boards of Education . . . have . . . discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of [c]onstitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of government as mere platitudes.[184]

Because the Bill of Rights was intended to protect the minority from tyranny of a majority of the population, the Court stated that each individual's right to life, liberty, and property, to free speech and press, to freedom of assembly and to worship could not be subjected to political controversy and majority determination. Although boards of education have expertise not shared by the courts, which generally is good reason for courts not to interfere in their decisions regarding curricula, the courts will step in to protect individual liberties.

> Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> It seems trite to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the [s]tate or of the nature or origin of its authority. We set up government by the consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce

180. 310 U.S. 586 (1940).
181. *Barnette*, 319 U.S. at 631 (quoting *Gobitis*, 310 U.S. at 604 (Stone, J., dissenting)).
182. *Barnette*, 319 U.S. at 631 (emphasis added).
183. *Id.* at 637.
184. *Id.*

> that consent. Authority here is to be controlled by public opinion, not public opinion by authority. . . .
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[185]

The Court overruled *Gobitis* and struck down the requirement of participation in recitation of the pledge by all students. *Barnette* was decided in the midst of World War II, a time when the nation faced an implacable threat from totalitarian enemies and the need for national unity was intensely felt. Despite these circumstances, the Court found that individual liberty was more important than inculcation of uniform beliefs in the schools.

The Sixth Circuit applied the holding of *Barnette* to the *Mozert* case.[186] In so doing, it recognized that mere exposure to ideas cannot threaten an individual's fundamental rights because it involves neither compulsion nor inculcation. The plaintiff parents' reliance on *Barnette* in their brief[187] is misplaced because, although the holding applies to any attempt to compel declaration of a belief, no such compulsion existed in the Hawkins County Public Schools. Moreover, prohibition of exposure of students to ideas, as sought by the parents in *Mozert*, would raise free speech issues and defeat the entire purpose of education.[188] Finally, imposition of the Fundamentalist Christians' educational preferences would interfere with the rights of other students in the schools to receive the best education possible by limiting their exposure to ideas, further removing this case from the four corners of *Barnette*.

In *Everson v. Board of Education*,[189] the Court upheld a New Jersey statutory scheme to provide school bus transportation to students in private schools, most of which were sectarian, because the benefit was to individual students and their parents and not directly to sectarian schools. Despite the result, this case contains language which on its face leaves no doubt about there being a need for a "wall of separation" between church and state.[190] The legacy of this case has been a mixed

185. *Id.* at 641-42. This standard is asserted consistently in Supreme Court cases dealing with the curricula of the public schools. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853 (1982); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); School Dist. of Abington Township v. Schempp, 374 U.S. 206 (1963).

186. *See supra* notes 73-83 and accompanying text.

187. Brief for Appellee Parents, *supra* note 27, at 68.

188. The chilling effect of censorship by prior restraint is forbidden by the first amendment right to free speech. *See* New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931); Mertz, *supra* note 3. Ms. Mertz stated that, in her view and that of many educators, the purpose of education was to expose children to as many ideas as possible so that they will realize the importance of ideas and thinking. *See also* Miller, *supra* note 3 (which corroborates that this concept of education is certainly encompassed within the educational goals and philosophies discussed within *supra* notes 94-126, 127-52 and accompanying text).

189. 330 U.S. 1 (1947).

190. *Id.* at 16.

message to "separationists" and "accommodationists"[191] alike: some interaction between church and state is permissible but not to the extent that the state aids or opposes any one or all religions or non-religion; nor can the state punish persons for having or professing religious beliefs or disbeliefs.

A challenge to the Champaign, Illinois mandatory "time-release program," providing for religious training in public school buildings by church representatives, was involved in *Illinois ex rel. McCollum v. Board of Education*.[192] Relying on *Everson*, the Court found excessive entanglement between church and state and struck down the law. Justice Frankfurter's concurrence in *McCollum* outlined the history of public education in the United States and identified the reasons for secular public education:

> It is pertinent to remember that the establishment of this principle of Separation in the field of education was not due to any decline in the religious beliefs of the people. . . . The secular public school did not imply indifference to the basic role of religion in the life of the people, nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the [s]tate undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of [g]overnment from irreconcilable pressures by religious groups, of religion from censorship and coercion, however subtly exercised, requires strict confinement of the [s]tate to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.[193]

Everson and *McCollum* stand for the proposition that there can be no advancement or inhibition of religion in the public schools. Contrary to the plaintiff parents' contentions in the *Mozert* case, this is not due to antipathy toward religion but, at least in part, to a desire to avoid the political and social turmoil that would result from advancing some reli-

191. *See* F. SORAUF, THE WALL OF SEPARATION 8-9 (1976). An "accommodationist" is one who would accommodate the unrestrained interaction between church and state despite the prohibition of the establishment clause.

192. 333 U.S. 203 (1948).

193. *Id.* at 216-17 (Frankfurter, J., concurring). The concern with avoiding political strife over religion in the schools is picked up as dictum in Lemon v. Kurtzman, 403 U.S. 602, 622-24 (1971). *See also supra* notes 1-5, 96-99 and accompanying text (for an historical overview of strife in the schools over religion).

gious beliefs and not others in the public schools. It has been shown that the public schools in this country have strict guidelines of neutrality with regard to religion and religious teaching.[194] Yet, the plaintiff parents in *Mozert* would have the courts breach the "wall of separation" that has stood between government and religion more or less firmly for two hundred years so that the curricula of the public schools would reflect a "Christian perspective." In their appellate brief, plaintiffs cite the conflict that arose in Hawkins County when they sought to have their viewpoint represented in the curriculum of the local primary and middle schools.[195] Fundamentalist Christians throughout the country would have the public schools breach the "wall of separation" regardless of the resulting strife, even though most public schools are carefully neutral in their approach to religion.

The Court again addressed the role of religion in the public schools in *Engel v. Vitale*.[196] Justice Black, writing for the Court, asserted that the role of the religion clauses is to prevent religious persecution. The Court struck down the required recital of "The Regent's Prayer," a nonsectarian prayer composed by the New York Board of Regents. The Board of Regents is an agency charged with overseeing public education in New York and had composed the prayer in order to promote both spiritual and moral training in the schools. The fact that religious exercises are excluded from the public schools is not an indication of hostility toward religion, rather it is an affirmation of the freedom of each person in the country to choose the way he or she believes and how to express those beliefs. Fundamentalist Christians consistently ignore the plain language used by the Court in its decisions, such as *Engel*, to affirm the importance of religion in our society and rail against those decisions because of their desire to impose their beliefs on the public schools.[197]

In *School District of Abington Township v. Schempp*,[198] the Court, without comment, struck down required reading of the King James Bible in Pennsylvania public schools and the recital of the Lord's Prayer in the public schools of Maryland. *Abington* emphasized the importance of religion in both the development of the country and in the daily lives of citizens and held that the state must remain neutral, neither promoting nor opposing religion or non-religion. In dictum, Justice Clark pointed out that teaching *about* the Bible as literature or the influence of religion historically would offend neither the establishment clause nor the free exercise clause.[199] Justice Clark also examined the interplay between the religion clauses and concluded that "[t]he distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predi-

194. *See supra* notes 151-57 and accompanying text.

195. Brief for Appellee Parents, *supra* note 27, at 7-11.

196. 370 U.S. 421 (1962).

197. *See generally* Brief for Appellee Parents, *supra* note 27.

198. 374 U.S. 203 (1963).

199. This viewpoint is picked up in other Supreme Court decisions. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968). The policy guidelines referred to in *supra* notes 147-54 and accompanying text also emphasize this aspect of education and religion.

cated on coercion while the Establishment Clause violation need not be so attended."[200] Justice Brennan, concurring, noted that parents objecting to the secular nature of public education had the choice of sending their children to private sectarian schools.[201] Citing *Hamilton v. Regents of the University of California*,[202] where the Court upheld compulsory military training at state universities, Justice Brennan addressed the interplay between the religion clauses and pointed out that government power to regulate or prohibit conduct motivated by religious beliefs is different from government inability to compel behavior offensive to religious principles. The deciding factor in *Hamilton* was the fact that attendance at the state university was by choice. Justice Brennan stressed the ability of the government to regulate the "behavioral manifestations of religious beliefs, [but] it may not interfere at all with the beliefs themselves."[203] He also considered the role of the Court in cases involving public schools:

> It is not the business of this Court to gainsay the judgments of experts on matters of pedagogy. Such decisions must be left to the discretion of those administrators charged with the supervision of the nation's public schools. The limited province of the courts is to determine whether the means which the educators have chosen to achieve legitimate pedagogical ends infringe the constitutional freedoms of the First Amendment.[204]

This theme runs through many Supreme Court decisions, including some involving the religion clauses and others involving disciplining of students.[205] However, Fundamentalist Christians would have us believe that the courts are practically running the schools.[206]

The state of Arkansas enacted, but never enforced, a law prohibiting teaching from any textbook containing a discussion of the theory of evolution. In *Epperson v. Arkansas*,[207] a public school teacher challenged the validity of that law because she had violated it and feared prosecution. The Court struck down the law. While recognizing the control that states and localities have over education and the fact that teaching *about* religion is not prohibited in the public schools, Justice Fortas, writ-

200. School Dist. of Abington Township v. Schempp, 374 U.S. 206, 223 (1963). In *Mozert*, this distinction played a critical role in the Sixth Circuit Court's reversal of the remand decision.

201. *Id.* at 242. However, Justice Stewart, dissenting, cites Murdock v. Pennsylvania, 319 U.S. 105 (1943), for the proposition that the first amendment is available to all and not just those who can pay their way. *Abington*, 374 U.S. at 313.

202. 293 U.S. 245 (1934).

203. *Abington*, 374 U.S. at 254.

204. *Id.* at 279.

205. *See, e.g.*, Bethel School Dist. v. Fraser, 478 U.S. 675 (1986) (discipline); Board of Educ. v. Pico, 457 U.S. 853 (1982) (right to hear); Wood v. Strickland, 420 U.S. 308 (1975) (discipline); Goss v. Lopez, 419 U.S. 565 (1975) (discipline); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (discipline); Epperson v. Arkansas, 393 U.S. 97 (1968) (establishment clause).

206. *See generally* T. Ascik, *Why Are We Going Backwards in Education?*, Speech at the Heritage Foundation (July 16, 1986); WOOD, *supra* note 134; LaHaye, *supra* note 1.

207. 393 U.S. 97 (1968). *Epperson* was recently upheld when the court struck down a Louisiana law requiring "equal time" for teaching of "creation science" along with biological theories of evolution. *See also* Edwards v. Aguillard, 482 U.S. 578 (1987).

ing for the court, stated: "There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[208] This statement was used in the reversal of the Remand Decision. Allowing students to opt-out of the reading program adopted by the Hawkins County Public Schools would be tailoring the curriculum to the principles of the Fundamentalist Christians' religious beliefs.

Rhode Island and Pennsylvania passed statutes providing for direct supplementation of income to nonpublic school teachers and institutions. Subsequently, these statutes were attacked for violating the establishment clause. The case of *Lemon v. Kurtzman*[209] resolved this issue and crystallized the three part test used by the Court to determine whether a state has violated the establishment clause. Writing for the Court, Chief Justice Burger set out the *Lemon* test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.' "[210] Chief Justice Burger further refined the entanglement prong of the *Lemon* test: "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the [s]tate provides, and the resulting relationship between the government and the religious authority."[211] The Court did not address the first two prongs of the test in this case because it found that both statutes created excessive entanglement between the states and religion due to the need for supervision and administration by the states of the funding programs which clearly were designed to aid secular institutions. Another concern of the Court was raised in dictum: the potential for political strife due to government entanglement with religion. Because religious beliefs are held so passionately, state involvement with religion or non-religion is likely to cause political turmoil. Other dictum within the Court's opinion recognized the impossibility of eliminating all interaction between state and church. The goal is to prevent the intrusion of either the

208. *Epperson*, 393 U.S. at 106.

209. 403 U.S. 602 (1971). The Lemon Test has been applied in cases involving financial assistance to religion or religious schooling in a number of cases. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (which held that New York financial aid programs to private schools, mostly sectarian, violated establishment clause by advancing religion); Meek v. Pittenger, 421 U.S. 349 (1975) (state financial aid to private schools inculcating religious values and belief violates establishment clause); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (provision of standardized testing to ensure compliance with state educational standards is secular purpose); Mueller v. Allen, 463 U.S. 388 (1983) (Minnesota law allowing deductions of certain expenses to all parents of schoolchildren whether enrolled in public or private schools not in violation of establishment clause because it serves secular purpose of educating the citizenry); Aguilar v. Felton, 473 U.S. 402 (1985) (New York City's use of federal funds to finance remedial instruction by public school teachers in private schools created excessive entanglement).

210. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations omitted).

211. *Id.* at 615.

church or the state into the precincts of the other. The effort of the plaintiff parents in *Mozert* and of Fundamentalist Christians throughout the country is a clear attempt to have religion intrude into the governmental precinct of the public schools. Such intrusion is forbidden by the establishment clause and Supreme Court precedent. There is no secular purpose motivating Fundamentalist Christians, nor is the primary effect of their educational proposals secular. If the Religious Right is successful in imposing its will on the public schools, there will be an impermissible entanglement between the state and religion because each school board will be required to create a curriculum "tailored" to accommodate Fundamentalist Christian beliefs.

The role of tradition in the relationship between the state and religion was addressed in *Walz v. Tax Commission*.[212] In *Walz*, the argument was made that a grant of tax exemptions to places of worship would create an establishment of a state religion. "That claim could not stand up to more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present."[213] Tradition and historical practice have been used to overcome arguments that the establishment clause has been violated.[214]

The role of the public schools in instilling democratic values and developing students to their fullest potential has been recognized throughout their existence.[215] The separation of religion and the state is as old as the national government. Although the Religious Right would have us believe that the Supreme Court reversed a prevailing practice of prayer in the schools, only slightly more than thirty percent of the schools in the nation ever regularly conducted devotional exercises.[216] As demonstrated above,[217] the traditional practice in the public schools is not to teach religion. Fundamentalist Christians would breach this tradition in order to promote their religious beliefs. The fact that their conduct and attitude causes significant political strife throughout the country does not seem to faze the Fundamentalist Christians, even though the Court has consistently found that one purpose of the need for separation of church and state is to avoid such strife. Although there is little consensus regarding the Founding Fathers' reasons and intentions in drafting the religion clauses as they now stand,[218] there is general agreement among scholars that a major purpose was to avoid the turmoil the Founding Fathers had seen arising from entanglement of

212. 397 U.S. 664 (1970).

213. *Lemon*, 403 U.S. at 624.

214. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983). The Nebraska legislature's practice of beginning each session with a prayer in the "Judeo-Christian tradition" is permissible as a continuation of a practice "deeply embedded in the history and tradition of this country." *Id.* at 624; Harris v. McRae, 448 U.S. 297 (1980) (statute which "happens to coincide" with the tenets of some or all religions is not necessarily in violation of the establishment clause if it reflects "traditionalist values").

215. *See supra* notes 94-144 and accompanying text.

216. R. DIERENFIELD, RELIGION IN AMERICAN PUBLIC SCHOOLS (1962).

217. *See supra* notes 94-144 and accompanying text.

218. *See, e.g., Tension, supra* note 4; TRIBE, *supra* note 8.

religion and government.[219]

In *Wisconsin v. Yoder*,[220] Old Order Amish parents challenged Wisconsin's compulsory attendance statute which required children to attend public or private schools until the age of sixteen. The parents alleged the statute was a violation of their right to free exercise. Chief Justice Burger recognized the strong state interest in educating its children but found that "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests."[221] One interest which is able to overcome that of the state's interest in universal compulsory education is the right to free exercise of religion. Dictum to the effect that parents have a strong interest in the religious education and upbringing of their children is drawn from the *Pierce* opinion[222] and was used by the Court in *Yoder* to illustrate that the state's interest in educating its children can be overcome. The holding in *Yoder* determined that where the state's interest in universal compulsory education conflicts with a parent's right to see to the religious upbringing of his children under the free exercise clause, the state's interest must yield. The Court found that the education of teenage children within the Old Order Amish society is equivalent to vocational training in the public schools and that the state's interest in educating Amish children was not strong enough to overcome the Amish parents' rights to raise their children according to their religious beliefs.

In *Mozert*, the plaintiff parents relied on *Yoder* as supporting their position. The Sixth Circuit distinguished the facts of *Yoder* from the facts involved in *Mozert* and consequently found that the plaintiff parents' reliance on *Yoder* was misplaced.[223]

In *Board of Education v. Rowley*,[224] parents of a deaf child sued, under the Education of the Handicapped Act (the Act),[225] to obtain the services of a universal sign language interpreter for their child in school. The school provided an "individualized educational program," including a special hearing aid and individual tutors, for the child, who was doing exceptionally well in school without an interpreter. The Court held that the legislative history of the Act indicated that the schools must provide a "meaningful" education to handicapped children and no more. The fact that the child in this case was doing exceptionally well was found to be an indication that she was receiving a meaningful education. The Court set out standards of review for determining whether programs meet the requirements of the Act: courts must not only be careful to limit their review to a determination of whether the require-

219. *See, e.g.*, McCollum v. Board of Educ., 333 U.S. 203 (1948); Lemon v. Kurtzman, 403 U.S. 602 (1971).

220. 406 U.S. 205 (1972).

221. *Id.* at 215.

222. *See* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

223. *See supra* notes 731-83 and accompanying text.

224. 458 U.S. 176 (1982).

225. 20 U.S.C. § 1400 (1982).

ments of the Act are met, but also allow the states to choose educational methods suitable for children in the program and not impose the court's own views in overturning "a State's choice of appropriate educational theories."[226]

The holding in *Rowley*, which is consistent with *Pierce* and other precedent, suggests that parents may have input in the education of their children but that *control* of education resides in the state and local governments providing it. Thus, the argument in *Mozert* that parents have been given *absolute* control over the education of their children by the Supreme Court is groundless. The Court has consistently held that local and state government has discretion to control curriculum in the public schools and that parents have the right and duty to see to the education of children beyond that provided in those schools.[227]

The Supreme Court also addressed the question of curriculum control in *Board of Education v. Pico*.[228] *Pico* involved the ability of a school board to remove books from public school libraries. The Court held that there is a "right to hear" founded in the first amendment:

> [J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members. Of course all First Amendment rights accorded to students must be construed 'in light of the special characteristics of the school environment.'[229]

While school boards have discretion in determining a curriculum to meet the "duty to inculcate community values" in their students, this discretion is limited to the classroom and does not extend to school libraries where "the regime of voluntary inquiry . . . holds sway."[230] Because *Pico* is a plurality decision, it has little, if any, precedential value but it does confirm the discretion of local school boards to determine a curriculum for their schools without court interference so long as there is no violation of students' first amendment rights and freedoms.

The "right to hear" language in *Pico* is implicit in the Sixth Circuit holding in *Mozert* that mere exposure to ideas cannot violate the establishment clause. Since the public schools are especially important as marketplaces of ideas and some educators assert that the whole process of education is no more than exposure of students to as many ideas as

226. Board of Educ. v. Rowley, 458 U.S. 176, 207-08 (1982).

227. *See* Epperson v. Arkansas, 393 U.S. 97 (1968); School Dist. of Abington Township v. Schempp, 374 U.S. 206 (1963); Board of Educ. v. Barnette, 319 U.S. 624 (1943). These cases provide a general discussion regarding the discretion of school boards, state and local governments' to prescribe the curriculum of the public schools without court intervention absent interference with fundamental rights. The *Pierce* case stands for the proposition that parents control children's education *beyond* that provided in the public schools. *See supra* notes 170-73 and accompanying text.

228. 457 U.S. 853 (1982).

229. *Id.* at 868.

230. *Id.* at 869.

possible, creation of a "right to hear" in the schools seems to be a reasonable solution to the dilemma presented by the challenge to public education posed by the Religious Right. The religious concepts espoused by Fundamentalist Christians could be presented as part of general discussions in programs addressing the social or historical significance of religion. In this way, but in no other, the religious views of any group could be introduced into the curriculum of a public school. Going further to accommodate *any* religious or non-religious viewpoint would be a clear violation of the establishment clause.

A recent example of the limits imposed upon the first amendment rights of schoolchildren is *Bethel School District v. Fraser*[231] in that a high school honor student challenged the discipline imposed on him for making a suggestive speech that caused a disruption at an assembly of students. The Court found that students' rights to free speech are limited by the need to maintain discipline in the school setting and stated that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[232] Recognizing that the primary purpose of free public education is the preparation of pupils for citizenship and "the inculcation of fundamental values necessary to the maintenance of a democratic political system,"[233] the Court went on to hold that:

> These fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these 'fundamental values' must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behaviour. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.[234]

The Supreme Court in *Fraser* recognized limits to the first amendment right to free speech of school children.[235] It would be but a short step from this position to limit students' rights to free exercise of their religious beliefs in the schools. Such a limitation would avoid the often repeated problems in the public schools arising from the tension between the religion clauses. However, it is difficult to advocate limiting any fundamental right because starting down that path might place the individual rights revolution of the last forty years on the edge of the

231. 478 U.S. 675 (1986).

232. *Id.* at 682. The *Fraser* Court relied primarily on the authority of Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

233. *Id.* at 681.

234. *Id.*

235. *See also* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (which recognized the limitations upon school children's first amendment right to free speech).

steep and slippery slope to its demise. A more reasonable approach to present resolving the religious strife in the public schools would be to formalize the concept that there is a "right to hear" inherent in and complimentary to the first amendment right to freedom of speech, as held in *Pico* and implied in Judge Lively's opinion in *Mozert*.

CONCLUSIONS

Time and again the Supreme Court has found that the main function of public schools is the inculcation of society's values in preparation of students for adult life as citizens. The public school system has great discretion in determining the ways in which the schools go about accomplishing these goals but that discretion is limited by the constitutional rights of pupils, parents, and teachers. Although parents have important roles in determining their children's religious training, the Court has consistently found that the appropriate place for such training is not the public schools but in private schools, at home, and in church. Curriculum is controlled by state and local government through professional educators hired to determine the best means of educating our youth. Courts will step into the process of curriculum planning and implementation only where the fundamental rights of parents, students, or teachers are threatened. Fundamentalist Christians derogate the discretion of professional educators and the state to control the school system by inappropriately citing dicta from Supreme Court decisions. The Fundamentalist Christians' court challenges to curriculum decisions of professional educators, such as in *Mozert*, are an attempt to force the public schools into using teaching techniques and philosophies tacitly rejected by educators when they select other methods. This is ironic in view of the fact that Fundamentalist Christians rail about the manner in which the Supreme Court has forced the removal of religion from the public schools making them into a training ground for the "Godless religion of secular humanism." The challenge thrust upon the public schools by the Religious Right is inappropriate because there has been no infringement by the schools on Fundamentalist Christian students' constitutional rights in the various cases discussed above.

Among the values necessary for maintaining our pluralistic democratic society is tolerance toward views which differ from the norm. A corollary to this value is the need for all persons to accept the rule of the majority *so long as the fundamental rights of the minority are not violated.* In *Mozert*, the Fundamentalist Christian minority in attempted to impose its values upon the local public school system through the judicial system. The changes in public education sought by the plaintiff parents in *Mozert* are representative of those sought by the Fundamentalist Christian minority throughout the United States. Such changes would radically alter the function of the public schools in our society. The Fundamentalist Christian assault on the public school system is an attempt to impose the will of a minority upon the majority in a situation where there has been no violation of the minority's constitutional rights. The principles of

democratic government will not permit this imposition; Fundamentalist Christians must acknowledge and accept the fact that they live in a society with great diversity in religious beliefs.

The primary goal of the Fundamentalist Christian challenge to public education is either to "put religion back into the schools" or to destroy the system and replace it with a system run by Christians. Consideration of the history of American public education demonstrates that "religion," as conceived by Fundamentalist Christians, was never a part of the public school curriculum. Supreme Court precedent establishes that accommodating any religious group's demand to include its viewpoint in the public school curriculum would be a violation of the establishment clause. Restricting the range of ideas available to students implicates first amendment rights of free speech. Furthermore, the pressures put on the public school systems by the Religious Right actually give rise to a chilling effect which causes teachers to censor the material they present in class, even though such material complies with local and constitutional guidelines. Fundamentalist Christian high pressure tactics cannot and will not be tolerated either by the courts or the majority of the population if the end result is to inhibit the free speech rights of others. These attacks also cause significant social and political strife. One of the few areas of agreement regarding the rationale behind the religion clauses is the belief that they intended to prevent the strife from government involvement with religion.

Given the traditional role of the public schools in creating good citizens, the Fundamentalist Christian goal of replacing them with Christian schools is also improper. Part of the education of a good citizen is the development of democratic values, including tolerance for the sensibilities and viewpoints of others. Refusal to accept the beliefs of others on religious grounds can be accepted in society so long as it does not infringe on the rights of people to believe as they choose. Religious intolerance cannot be accepted in the public schools anymore than racial intolerance because of its philosophical conflict with democratic values.

The Religious Right demands elimination of certain curriculum content and teaching techniques because of alleged violation of Fundamentalist Christian beliefs. The teaching techniques challenged by the Fundamentalist Christians have been demonstrated by both research and application to be the most effective ways to teach students the skills and material necessary for their success in today's increasingly complex society. Since the second major goal of education is the development of individuals to their fullest capacity, accommodation of Fundamentalist Christian demands for use of less effective teaching methods would be improper.

The demands for change in public education made by the Fundamentalist Christian minority are inappropriate in light of the United States Constitution, Supreme Court precedent, the traditional role of public schoools in society and the need for effective education. The Religious Right derogates the judicial system for having removed reli-

gion from the schools but at the same time it attempts to use the judiciary to further its own views. The courts have consistently found that the demands of the Fundamentalist Christian minority cannot be accommodated in the schools without violating first amendment rights of others. Although Fundamentalist Christians are correctly concerned about the failure of public schools to recognize the role of religion in the history and society of our nation and the world, their general demands cannot be met without violating the establishment clause. In fact, there is good reason to believe that this lack of objective presentation of religious views in the schools arises primarily due to the activities of the Fundamentalist Christians. It is a well-accepted equitable principle that one cannot plead his own wrong as grounds for relief. If the Religious Right want their children taught from a "Christian perspective," they will have to utilize alternatives such as home schooling or private education to do so because their demands cannot be met in the public schools without violating constitutional law.

Joseph C. Cohen, Jr.